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EXAMINATION PACK

CPR3701 – CRIMINAL PROCEDURE

PAST PAPER SOLUTIONS AND NOTES



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OCT/NOV 2020 TEST YOURSELF QUESTIONS FOR CPR3701

**SOME OF THE STATEMENTS ARE CORRECT WHILE SOME ARE INCORRECT.
YOU MUST BE ABLE TO IDENTIFY THE CORRECT AND THE INCORRECT.**

- (1) Where a child and an adult are charged together in the same trial in respect of the same set of facts, the provisions of the Child Justice Act automatically apply to an adult offender. **False** (page 26 txtbk)
- (2) Persons who through participation in the same transaction commit different offences cannot be jointly tried. **False** (pg 255 txtbk, section 156 CPA)
- (3) Any number of offences committed by the accused cannot be charged against him or her in one indictment. (**False** section 81, CPA pg 255)
- (4) A court can order the removal of a trial from one venue to another venue if the court deems it necessary or expedient. (**True** pg 258 txtbk, section 149)
- (5) The court cannot, whether on application or not, order the accused/the witness to give evidence by way of closed-circuit television. (**False** pg 113 txtbk, section 158 CPA)
- (6) The trial of the accused commences at his first appearance in court. (**False** pg 60 sg)
- (7) The right of the accused to be present in court cannot be limited in any way. (**False** there are exceptions pg 112 txtbk))
- (8) In Baloyi 2000 (1) SACR 81 (CC) it was held that no one can be convicted without a fair trial. (**True** pg 332 txtbk)
- (9) The right to a fair trial in terms of section 35(3) of the Constitution includes the right to have police bail. (**False**)
- (10) The fair trial principle does not include appeal process. (**False** section 35(3)(o) of the Const pg 446 txtbk)
- (11) The fair trial does not demand that there should be informed participation by the unrepresented accused. (**False** pg 333 txtbk)

- (12) The presiding judicial officer has a right to cross examine the accused. (**False** pg 333 tbk, *Du Plessis* 2012)
- (13) A party who is aggrieved by the conduct of the presiding judicial officer during trial can bring an application for the recusal of such officer. (**True** 334 tbk)
- (14) In terms of the principle of ~~judicial control~~, neither the state nor the accused should be permitted to reopen their cases once closed. (**False** 336 tbk, principle of finality instead)
- (15) A criminal trial is a state-sponsored ~~private~~ judicial oral hearing. (**False** pg 331 tbk)
- (16) A charge valid even if it does not sets out the particulars of an offence with which an accused is charged. (**False** section 84(1) CPA pg 241 tbk)
- (17) Where a charge is defective for want of an averment which is an essential ingredient of the relevant offence, the defect cannot be cured by evidence at the trial proving the matter which should have been averred. (**False** section 88 CPA pg 246)
- (18) The court must enter a plea of guilty if the accused refuses to plead or answer directly to the charge. (**False** innocent until proven otherwise pg 277)
- (19) Section 77 of the CPA sets out the requirements with which a charge should comply. (**False** section 84(1, section 77 mental capacity of a child)
- (20) A defect in the charge sheet or indictment may be cured by evidence. (**True** section 88 CPA, pg 245)
- (21) Section 81 of the CPA allows the amendment of the charge sheets that are defective. (**False** section 81 regulates joinder of offences)
- (22) If the prosecutor refuses to provide further particulars and the court concurs with the prosecutor, the presiding officer may lodge an appeal. (**False** pg 244 tbk)
- (23) The summary of the essential facts does not form part of the indictment in a high Court. (**False** pg 137 tbk)
- (24) Where the state relies on common purpose, it is essential to allege the common purpose in the charge sheet. (**True**)



- (25) When during the trial, it appears that any words or particulars in an indictment or charge are superfluous, no amendment can be made. (False section 86 and 88 pg 245)
- (26) If a charge sufficiently discloses an offence, but is lacking in adequate narration of particulars, the accused is deemed to have waived his or her right to apply for particulars but he can set up such defect on appeal. (False he cannot, pg 245)
- (27) Where the material element of crime in question was omitted, the accused may still be found guilty for as long as the evidence at the trial proved the element omitted in the charge. (True section 88)
- (28) A plea of *autrefois acquit* implies that the accused was previously acquitted of the offence with which he or she is currently charged. (True)
- (29) A plea of *autrefois acquit* implies that the accused was previously convicted of the offence with which he or she is currently charged. (False)
- (30) A plea of *autrefois convict* implies that the accused was previously acquitted of the offence with which he or she is currently charged. (False)
- (31) A plea of *autrefois convict* is used at the end of the trial of the trial after conviction. (False)
- (32) Where the plea of an accused is ambiguous, the court must enter a plea of not guilty and question the accused in terms of section 115 of the CPA. (True pg 277)
- (33) Where the plea of an accused is ambiguous, the court must enter a plea of guilty and question the accused in terms of section 115 of the CPA. (False pg 277)
- (34) Where the plea of an accused is ambiguous, the court must enter a plea of not guilty and question the accused in terms of ~~section 112~~ of the CPA. (False pg 277 section 115 not 112)
- (35) Where the accused pleads **not guilty** but does not have a reasonable explanation for the plea, the court must enter a plea of guilty. (False)
- (36) A plea may be changed from guilty to not guilty if the court is in doubt as to whether the accused is, in law guilty of the offence to which he or she has pleaded guilty. (True)
- (37) The court may change a plea from not guilty to guilty if it is convinced that the accused does not have a reasonable defense. (False)
- (38) Statutory plea bargaining can only take place where the state is represented by the state Advocate. (False)
- (39) Statutory plea bargaining can only take place where the accused is not represented. (False)

- (40) Section 115 of the CPA can be used to alter a plea of guilty to one of not guilty where, during the arraignment phases, the court finds that the accused has a defence. (False section 113)
- (41) Section 111 of the CPA can be used to alter a plea of guilty to one of not guilty where, during the arraignment phases, the court finds that the accused has a defence. (False section 113)
- (42) The accused once pleaded, he/she is bound by that plea and under no circumstances can he or she change it. (False)
- (43) An accused may tender the plea that the court does not have jurisdiction to hear the case (True section 106 of CPA)
- (44) After pleading, the accused is entitled, without exception, to a verdict. (False pg 309)
- (45) After pleading, the accused is entitled, without exception, to a sentence (False pg 309 tbk)
- (46) A witness may plead truth and public benefit where the charge is one of criminal defamation. (True section 107 CPA pg 285)
- (47) Section 115 of the CPA allows the accused to plead not guilty and to admit to certain elements of the offence. (True)
- (48) Bail is inherently penal in nature. (False non-penal pg 195)
- (49) Bail can be used to deter other would-be offenders. (False pg 195 txbk)
- (50) The accused person's previous convictions or pending charges are irrelevant for the consideration of release on bail. (False pg 213)
- (51) The accused person's previous convictions or pending charges are relevant for purposes of bail. (True pg 213)
- (52) Refusal to grant bail by the court is appealable by the accused. (True pg 200)
- (53) Refusal to grant bail by the court is not appealable by the accused. (False pg 200)
- (54) Where an accused is related to the complainant, he or she cannot be released on bail. (False)
- (55) Where the accused has a passport and has property outside South Africa, he/she will not be released on bail. (False)
- (56) The court may, when it considers release on bail, take into account that the accused will endanger the safety of the public or any particular person if released on bail. (True section 60(4)(a))
- (57) Once bail is granted, the state cannot appeal against it. (False pg 201 txbk)
- (58) The granting of bail is appealable by the witness. (False)
- (59) Where an accused is related to the prosecutor, he or she cannot be released on bail. (False)
- (60) In terms of section 35(1)(f) of the Constitution, every arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. (True pg 193 tbk)

- (61) An accused who is charged with kidnapping can be granted police bail. (False pg 197)
- (62) Police bail can be granted by any police official in the police station. (False pg 197)
- (63) An accused can only be released on police bail if he or she is legally represented. (False)
- (64) Release on police bail can only take place before an accused's first appearance in a lower court. (True pg 197)
- (65) Police bail may be granted where a person is charged with any offence other than murder and treason. (False all Schedule II and III offences)
- (66) Release on bail is a substitute for the accused's right to be brought to trial within a reasonable period. (False)
- (67) Sureties are acceptable in payment of bail. (True pg 209 tbk)
- (68) The director of public prosecution or a prosecutor authorized thereto in writing, may in respect of offences referred to in schedule 7 and in consultation with the investigating officer, authorize the release of an accused on bail. (True section 59A CPA pg 198)
- (69) The director of public prosecution or a prosecutor authorized thereto in writing, may in respect of offences referred to in schedule 1 and in consultation with the investigating officer, authorize the release of an accused on bail. (False schedule 7)
- (70) The director of public prosecution or a prosecutor authorized thereto in writing, may in respect of offences referred to in schedule 6 and in consultation with the investigating officer, authorize the release of an accused on bail. (False schedule 7)
- (71) In an application for bail pending appeal against conviction or sentence, the absence of reasonable prospects of success on appeal cannot justify refusal of bail. (False pg 208 txbk)
- (72) The court is *functus officio* after the delivery of judgment. (True Until a sentence has been imposed pg 292 txbk)
- (73) If a court is satisfied that substantial and compelling circumstances exist which justify a lesser sentence, it must deviate from the sentence prescribed. (True section 51(3)(a) pg 377 txbk)
- (74) Even if a court is satisfied that substantial and compelling circumstances exist which justify a lesser sentence, it cannot deviate from the sentence prescribed. (False)
- (75) After delivery of the judgment, the court is not *functus officio*. (False pg 292)
- (76) If there is no proof that the accused was a perpetrator or co-perpetrator or accomplice in the crime charged, he or she may be convicted as an accessory after the fact to the crime charged if there is, indeed proof that he or she acted in such capacity. (True section 257 CPA pg 355)
- (77) Competent verdicts are only possible if permitted by common law. (False pg 352)
- (78) Common assault is not a competent verdict on a charge of murder or attempted murder. (False section 258 CPA pg 355)
- (79) A caution does not amount to a sentence. (False pg 375)



- (80) Competent verdicts are only possible if permitted by statutory law. (True pg 353 tbk)
- (81) Theft with aggravating circumstances is a competent verdict to a charge of murder. (False for robbery not murder pg 355)
- (82) The sentence imposed on an accessory may exceed the sentence which may be imposed in respect of the offence with which the accused was convicted an accessory. (False section 257, pg 355)
- (83) An accused convicted upon a charge of having committed an offence can successfully raise the plea of prior acquittal. (False pg 354 txbk)
- (84) If an appellant who has noted and prosecuted his or her appeal fails to appear, the court may summarily dismiss the appeal as a consequence of non-appearance (True pg 461)
- (85) An accused may note an appeal even before conviction. (False)
- (86) An appeal is employed as a means to challenge a sentence only and not against conviction. (False)
- (87) The appeal court will automatically interfere with the trial court's exercise of discretion even if the appeal is dismissed. (False)
- (88) A charge sheet containing the following averments complies with all necessary requirements in terms of section 84(1) of the Criminal Procedure Act 51 of 1977: "That the accused is guilty of unlawfully and intentionally killing Joey Smith, an adult female on the 21st of January 2001 at Groenkloof in the district of Pretoria." (True)
- (89) Where an accused is convicted of both driving under the influence of liquor and reckless driving, and both counts are based on the same facts, this would not constitute an incorrect duplication of convictions. (False pg 251)
- (90) If assessors abscond during the trial without good reason and the magistrate continues with the trial without them, this amounts to a fatal irregularity which vitiates the proceedings. (True pg 260)
- (91) Generally, where an accused is caught selling dagga, he or she may be convicted only of selling and not also of possession of the rest of the unsold dagga. (True 253)
- (92) In practice the prosecutor usually charges the accused with the most serious crime as main charge, and the lesser offences as alternative charges. (True pg 255)
- (93) No additional charges can be joined after questioning of the accused in terms section 112 (1) (b). (True pg 255 txbk)
- (94) A charge of murder can be joined in the same indictment with any other charge. (True pg 255)
- (95) A charge of murder cannot be joined in the same indictment with any other charge. (False pg 255)
- (96) In the case of traditional plea bargaining, the prosecutor and the defence cannot bind the court to a sentence. However, the prosecutor may agree to suggest a possible lighter sentence to the court. (True section 105A CPA)
- (97) After the accused has brought an application for a separation of trials, a proper refusal to order a separation of trials will amount to an infringement of the accused's right to a fair trial. (False chapter 16 txbk)



- (98) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question. (True)
- (99) The general principle is that the conducting of criminal trials should take place in open court and in the presence of the accused. (True)
- (100) At the trial in the regional court of an accused on a charge of murder, the judicial officer must summon two assessors to assist him or her, unless the accused requests that the trial proceed without assessors. (True pg 259 tbk)
- (101) Section 112 can be used when an accused pleads guilty to a serious or less serious offence. (True)
- (102) It is possible for the accused to issue a written statement in terms of section 112. (True pg 286 tbk)
- (103) The accused may plead guilty in terms of section 115 of the CPA. (False section 112)
- (104) If the accused's refusal to plead is accompanied by such improper behaviour that it obstructs the conduct of the proceedings of the court, the court may order his or her removal and direct that the trial proceed in his or her absence. (True)
- (105) When the accused is called upon to plead to a charge, and it appears uncertain whether he or she is capable of understanding the proceedings at trial so as to be able to put forward a proper defence, an enquiry into his or her mental state should be made by the court, with the assistance of a general medical practitioner. (False pg 278)
- (106) Statutory plea bargaining in terms of section 105A of the Criminal Procedure Act means that the prosecutor can now reach an agreement with the defence on the sentence to be imposed. (True pg 283)
- (107) The indictment must be served on the accused in accordance with the rules of court. Service is complete the moment that the indictment is posted to the accused and received by him or her. (False pg 134 and 137 txbk)
- (108) Only the accused person appears in the dock. (True)
- (109) Where persons are jointly charged, the mere possibility of prejudice is not sufficient to justify an order for separation of trials in such a case. (True pf 327 tbk, there has to be probability not mere possibility)
- (110) Persons charged with separate offences alleged to have been committed at the same time and place, or at the same place and about the same time, may be tried jointly where the prosecutor informs the court that evidence admissible at the trial of one person will also be admissible as evidence at the trial of another person or persons. (True)
- (111) Section 86 makes provision for amendment of the charge and requires that the proposed amendment must differ to such an extent from the original charge that it is in essence another charge. (False)



- (112) The rule against the splitting of charges was in fact always directed at the duplication of convictions and was designed to apply in the field of punishment. (True)
- (113) Where an accused is charged with both rape and incest arising from the same act of intercourse, he will be convicted of both. (True)
- (114) If an assault is committed pursuant to or in the course of an attempt to escape, the accused should be convicted of one of these offences only. (True pg 252)
- (115) The prosecution or the accused may apply for the recusal of an assessor. (True)
- (116) An accused, or his or her counsel on behalf of the accused, may admit any fact placed in issue. (True)
- (117) Open justice can be limited where a witness is in danger of being exposed as a state informant. (True)
- (118) The notion of open justice establishes a protective function in respect of the fair-trial rights of the accused. (True)
- (119) It is regular for a court to put questions directly to an accused who is represented.
- (120) Bail is a form of monetary release from custody. (True)
- (121) During a bail application, the court may consider, as a factor, the prevalence of the type of crime with which the accused has been charged. (True)
- (122) During a bail application, the court may consider the accused's previous convictions. (True)
- (123) Hearsay is not admissible during a bail application. (False)
- (124) Refusal by the court to grant bail is appealable by the accused. (True)
- (125) The granting of bail is appealable by the prosecution. (True)
- (126) When considering release on bail the court may not take into account the accused's previous convictions. (False)
- (127) The court may make the release of an accused on bail subject to conditions which in the court's opinion, are in the interests of justice. (True)
- (128) Bail can be cancelled and the accused taken back into custody if he or she violates bail conditions. (True)
- (129) An accused can apply to court for cancellation of bail and for the refund of any bail amount paid.
- (130) The strict rules of evidence are relaxed during bail applications. (True)
- (131) Previous convictions are not taken in to account when the accused is released on bail. (False)
- (132) All the information elicited during a bail application forms part of the record of any subsequent trial. (False not all pg 214 tbk)
- (133) In terms of section 35(1)(f) of the Constitution, every arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. (True)
- (134) The information elicited during a bail application does not form part of the record of any subsequent trial. (False)



- (135) An accused may bring an action for damages where he/she is denied police bail on malicious grounds. (True pg 198)
- (136) Bail should be inherently penal in nature as a means of deterrence. (False)
- (137) Where bail is fixed, an accused is only released after the payment of a sum of money as determined by the court. (True pg 209)
- (138) A child offender may be released on bail by an authorized prosecutor prior to the first appearance at a preliminary inquiry. (True pg 284-285)
- (139) A third person may pay bail money for the benefit of the accused. (True)
- (140) A defect in the charge sheet or indictment may be cured by evidence. (True)
- (141) If the totality of the accused's criminal conduct can be accommodated in one single charge, the accused may not be convicted on multiple charges. (True)
- (142) The court must enter a plea of not guilty if the accused refuses to plead or answer directly to the charge. (True)
- (143) Where the plea of an accused is ambiguous, the court must enter a plea of guilty and question the accused in terms of section 115 of the CPA. (False)
- (144) The following are the requirements of a plea and sentence agreement in terms of section 105A. : - The plea and sentence agreement must be written. - The accused must be legally represented. - The sole purpose is for the accused to plead guilty. - The parties must not agree on a sentence. (False)
- (145) If the accused failed to object and the trial having run its normal course ends in a conviction, the fact that the venue was wrong will not assist the accused on appeal. (True pg 258)
- (146) The removal of a criminal case from one division of the High Court to another division of the High Court may take place on application by either the prosecution or the accused. (True pg 259)
- (147) The effect of removal from one division of the High Court to another maybe to confer jurisdiction upon a court which would not normally have been competent to try the accused. (True pg 259)
- (148) The removal from one division of the High Court to another will not be granted unless the presiding officer can show that it is not in the interest Justice to do such. (False applicant not presiding officer)
- (149) The requirements of the test for the presence of judicial bias are: Indicate the incorrect.
- (a) There must be a suspicion that the judicial officer might be not would-be biased
 - (b) The suspicion must be that of a reasonable person in the position of the accused.
 - (c) The suspicion may not be based on any reasonable ground. Inc.
 - (d) The suspicion must be one which the reasonable person referred to, would, not might, have held. (False pg 263)
- (150) The presiding officer in criminal cases should have no communication whatever with either party except in the presence of another. (True pg 263)
- (151) The Presiding officer decision must base his or he decision upon evidence heard in the presence of the accused. (True)



- (152) Evidence in court need not be given under oath or any affirmation. (**False**)
- (153) It is the duty of the court to be impartial. (**True**)
- (154) In *Mabuza 1991 (1) SACR 616 (O)*, it was stated that:
- (a) The court should not conduct its questioning in such a manner that its impartiality can be questioned.
 - (b) The court should not take part in the case to such an extent that its vision is loaded by the dust of the arena.
 - (c) The court should not interfere with the plea-bargaining agreement between the parties.
 - (d) The court should not intimidate witnesses or the accused so that his or her answers are weekend. (**True**)
- (155) The Principle of judicial impartiality as per the case of *Nnasolu 2010 (1) SACR 561 KZP* states that: (**false**)
- a. The presiding officer should not enter the arena.
 - b. The presiding officer is entitled in the interest of Justice to put such additional questions to witnesses including the accused.
 - c. The presiding officer should not only ensure that Justice is done but should also ensure that justice is seen to be done.
 - d. **There must be equal opportunity in addressing the court.**
- (156) Once the accused is found guilty the court may impose any of the following punishments: (**False**)
- (a) A fine
 - (b) Imprisonment
 - (c) Correction supervision
 - (d) Release on bail**
- (157) Some of the instances where the court of Appeal will interfere with a sentence of a lower Court are: (**False**)
- (a) That the sentence is vitiated by an irregularity and it appears to be to the court of Appeal that a failure of justice has resulted from such irregularity.
 - (b) When the trial Court has misdirected itself.
 - (c) When the sentence is so severe that a reasonable court would not have imposed it.
 - (d) That the prosecutor has adduced inadmissible evidence.**
- (158) All divisions of the High Court with criminal appeal jurisdiction have the power to increase any sentence on appeal unless the appeal is based solely on a question of law. (**True** pg 458)

- (159) The appeal Court may increase the sentence on appeal even though the appeal is against conviction only. (True pg 259)
- (160) The appeal Court cannot increase the sentence if the appeal is on only. (False)
- (161) In determining whether the trial court's findings of fact were clearly wrong, the evidence has to be assessed as a whole. (True pg 460 Hadebe case)
- (162) An accused may plead truth and public benefit where the charge is one of criminal defamation. (True)
- (163) An accused may plead truth and public benefit where the charge is one of defeating the ends of justice. (False)
- (164) Statutory plea bargaining can only take place where the accused is represented. (True)
- (165) A plea may be changed from guilty to not guilty if the court is in doubt as to whether or not the accused admits an allegation in the charge. (False)
- (166) Before the trial commences, the assessors must take an oath that they will give a true and correct verdict. (True)
- (167) As soon as the assessor's oath has been administered, they become members of the court. (True)
- (168) An assessor may request his or her recusal if he or she has a personal interest in the matter. (True)
- (169) If an assessor abscond without a valid reason during a trial, the magistrate may continue with the trial without him or her, and this does not amount to any irregularity. (False)
- (170) The presiding officer may at any stage before the completion of the proceedings order the recusal of the assessor if he from the proceedings if he or she is satisfied that- (False)
- (a) The assessor has a personal interest in the proceedings.
 - (b) The assessor is absent for any reason.
 - (c) The assessor has died.
 - (d) The has lost interest in the matter
- (171) A criminal trial commences once an accused has pleaded in a court which has the required jurisdiction to hear evidence. (True)
- (172) The phrase "in the course of a criminal trial" refers to all procedures which may or must be followed from the time the accused has pleaded until a verdict on the merits. (True)
- (173) A criminal trial can be broadly described as a state-sponsored, public, judicial and primarily oral hearing. (True)
- (174) The fair trial principle does not include appeal process. (False)
- (175) A fair trial includes the right to a speedy trial. (True)
- (176) A court can order the removal of a trial from one venue to another venue if the court deems it necessary or expedient. (True)



- (177) Section 186 of the Criminal Procedure Act empowers the court to recall witnesses who have previously testified at the trial so that they can be examined by the court. (True)
- (178) The right to a public trial can be validly limited where necessary. (True)
- (179) “Presence at trial” means more than the accused knowing what the state witnesses have said. It requires confrontation that is, seeing them as they testify against him/her or as they give evidence “in the face of the accused”. (True)
- (180) The court may, on application by either party/a witness order the accused/the witness to give evidence by way of closed-circuit television. (True pg 113 para 2.3)
- (181) Statutory plea bargaining can only take place where the accused is represented. (True)
- (182) At the end of a criminal trial, the court must consider and deliver its verdict based on the state’s ability to satisfy its burden of proof. (True)
- (183) The seven fundamental principles which govern a criminal trial are trial fairness, legality, judicial impartiality, equality of arms, judicial control, orality, and finality. (True)
- (184) It is generally impossible for the accused to be convicted on another charge where the prosecutor manages to prove the elements of that crime as opposed to the crime as charged at the trial. (True)
- (185) Audi Alteram Partem means that there is no ruling of any importance, either on merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. (True)
- (186) Judicial officers must base their decisions solely upon evidence heard in open court. (True)
- (187) In a division of the high court, the presiding judge has discretion to sit with or without assessors. (True pg 261)
- (188) The right to a fair trial includes the right to a prosecutor who acts without fear, favour or prejudice. (True)
- (189) Section 186 of the Criminal Procedure Act empowers the court to recall witnesses who have previously testified at the trial so that they can be examined by the court. (True Q177)



- (190) The principle of finality demands that the state and the accused have an opportunity to reopen their cases where they previously **failed to examine** evidence introduced in the main trial. (**False**)
- (191) The presiding officer must make sure that the accused understands the language used by a witness. (**True** pg 338)
- (192) Section 174 (CPA) provides that, if there is no chance that the accused will incriminate himself or herself during his or her defence, he or she must be discharged from prosecution. (**False** Pg 345 accused discharge is not based on him/her incriminating themselves but failure of the prosecution to prove their case)
- (193) The accused must be informed of the charge against him or her in sufficient detail to answer it. (**True**)
- (194) A court has a wide-ranging sentencing discretion. (**True** pg 375)
- (195) *Rabie* 1975 (4) SA 855 emphasised the role of the criminal, the crime and society in the implementation of punishment. (**True** pg 376)
- (196) If a court is satisfied that substantial and compelling circumstances exist which justify a lesser sentence, it must deviate from the sentence prescribed. (**True**)
- (197) After previous convictions have been proven, the accused is entitled to lead evidence in ~~aggravation~~ of sentence. (**False**)
- (198) As a general principle, young offenders are sentenced more leniently than adults. (**True**)
- (199) A person convicted time and again for similar offences will progressively be punished more severely. (**True** pg 37)
- (200) One of the first decisions of a sentencing court is whether to remove the offender from society or to punish him or her within the community. (**True** pg 385 para 10.2.1)
- (201) Ordinary imprisonment for a term determined by the court is the most common form of imprisonment. (**True** pg 386 para 10.2.2.1)
- (202) Prescribed minimum sentences are applicable to an offender under the age of 16 years. (**False**)

Question 67



- (203) An accused who is dissatisfied with the decision of a lower court on fact or law may bring the matter before a division of a higher court by way of appeal or review. (True pg 414)
- (204) It is a general rule that there is no appeal before conviction. (True)
- (205) A court of appeal can only interfere with the sentence of a lower court where that court (the lower court) failed to exercise its discretion judicially in a proper and reasonable manner. (True pg 457 para 1)
- (206) The right to appeal is not guaranteed in the Constitution of the Republic of South Africa. (False)
- (207) Common assault is a competent verdict on a charge of murder or attempted murder. (True pg 355)
- (208) Assault with intent to do grievous bodily harm is a competent verdict on a charge of murder. (True pg 355)
- (209) Public violence is a competent verdict to a charge of murder. (True pg 355)
- (210) Culpable Homicide is not a competent verdict on a charge of murder. (False pg 355)
- (211) A court of appeal can only interfere with the sentence of a lower court where that court (the lower court) failed to exercise its discretion judicially in a proper and reasonable manner. (True)
- (212) An appeal court is ordinarily loath to interfere with the findings of a trial court on questions of fact. (True pg 459)
- (213) If an appellant who has noted and prosecuted his or her appeal fails to appear, the court may summarily dismiss the appeal as a consequence of non-appearance. (True pg 461)
- (214) Appeal is used to address the situation where a party is aggrieved about an irregularity involved in arriving at the conviction. (False 421)
- (215) The function of a court in the instance of review is to determine whether the proceedings were in accordance with the demands justice. (True)
- (216) The question whether the proceedings were according to justice must in general be decided according to the circumstances that prevailed at the time of the application for the review. (False)



- (217) An accused who is dissatisfied with the decision of a lower court on fact or law may bring the matter before a division of a higher court by way of appeal or review. (True)
- (218) Judicial review is a process which allows a court to set aside a statute or provision on the grounds of unconstitutionality. (True pg 416)
- (219) If an adult accused wish to appeal the decision of a lower court, no leave to appeal is required. (False pg 447)
- (220) A court of appeal can hold an inspection *in loco*. (True pg 463)
- (221) For purposes of appeal, it is important to have a reliable record of the proceedings of the trial court. (True pg 464)
- (222) Where an appeal is not noted within the time periods indicated by the Criminal Procedure Act and the Magistrates' Courts Act, the court can condone the lateness and allow the appeal to proceed. (True pg 470 txbk)
- (223) Where an appeal is not noted within the time periods indicated by the Criminal Procedure Act and the Magistrates' Courts Act, under no circumstances can the appeal to proceed. (False pg 470)
- (224) In order to reconstruct a lost record, the recalling of witnesses who gave evidence during the trial would be irregular. (True pg 428)
- (225) A third party who has an interest in a verdict of guilty or in a subsequent order has *locus standi in iudicio* to appeal. (False pg 466 para 2.2.2)
- (226) A review is used to address the situation where a party is aggrieved about an irregularity involved in arriving at the conviction. (True)
- (227) Access to courts competent to hear constitutional matters may be gained by way of leave to appeal. (True pg 421)
- (228) The difference between appeal and review lies in the fact that appeal aims to correct a wrongful process whereas review challenges the merits of the case. (False pg 421)
- (229) In an appeal, the parties are confined to what appears on the record, but, in a review, it is permissible to prove any of the grounds for review. (False pg 422)
- (230) A review is generally not permissible on a finding of fact, unless the finding is so unreasonable that it constitutes an irregularity. (True 422)



- (231) Where a magistrate has made a mistake in the recording of the evidence, he/she cannot correct the mistake after sentence as he/she is then *functus officio*. (True pg 464)
- (232) A full court is a court of appeal and not a court of first instance, and, consequently, a criminal trial cannot be conducted before such a court. (True pg 481 para 3.2.1)
- (233) A court may discharge an offender with a mere caution and, although the discharge has the effect of an acquittal, the conviction is still recorded and counts as a previous conviction. (True pg 400 para 10.7)
- (234) Courts do not have a wide discretion with regard to the imposition of a fine as a form of sentence. (False pg 391)
- (235) Open justice can be limited in cases where the accused is in danger of being exposed as a state informant. (False)
- (236) The accused can testify by way of closed-circuit television in cases where an open trial may cause him or her emotional or physical harm. (False)
- (237) Witnesses are protected in cases of sexual assault and extortion by way of the court's discretion to "close the court". (True)
- (238) Irrespective of the charge, if a matter relates to an adult accused and complainant, the court cannot exclude the public from the trial in the interests of justice. (False)
- (239) Correctional supervision is described as a community based form of punishment. (True)
- (240) An *ex tempore* judgment does not infringe on the right of the accused to a speedy trial. (True pg 351)
- (241) An improper delay in delivering judgment undermines public confidence in the judicial system. (True pg 351)
- (242) Community service as a condition of a suspended sentence is not considered a punishment. (False)
- (243) Any conviction, sentence or order of a lower court, and even a discharge after conviction, are subject to leave to appeal. (True pg 449)
- (244) An appeal on the facts relates to the merits of the matter in the trial court. (True)
- (245) If the appellant files a notice of appeal after the prescribed period, he or she can apply for condonation, although the court is not obliged to grant it. (True)
- (246) A full Court in relation to any division of the High Court means a court consisting of 7 judges. (False pg 481)
- (247) If a person is authorised to arrest another, a bad motive for the arrest will not make an otherwise lawful arrest unlawful. (True)
- (248) For arrest to be lawful, it must have been properly authorised. (True 138)



- (249) For the arrest to be lawful, the arrestee must exercise physical control over the arrestor. (False pg 138)
- (250) For arrest to be lawful, the arrestor must inform the arrestee of the reason for the arrest. (True)
- (251) The Constitutional Court in *Ex Parte: Minister of Safety and Security: In re: S v Walters* 2002 (4) SA 613 (CC), stated that the shooting of the fleeing suspect is not permitted unless the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm. (True)
- (252) The Constitutional Court in *Ex Parte: Minister of Safety and Security: In re: S v Walters* 2002 (4) SA 613 (CC), stated that the shooting of the fleeing suspect is not permitted unless there are means of carrying out the arrest, whether at that time or later. (True)
- (253) In terms of section 32 of the CPA, a police official may search any person, container or premises for purposes of seizing any article referred to in section 20. False
- (254) Both private persons and police officials are empowered to conduct searches or to seize objects without a warrant. (True pg 182)
- (255) Evidence obtained in terms of an invalid search warrant may be excluded under section 35(5) of the Constitution. (True pg 123 sg)
- (256) In terms of s 35(5) of the Constitution, evidence obtained in a manner that violates any right in the Bill of Rights **may be** excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. (False)
- (257) Section 35(5) is meant to discourage and punish the illegal obtaining of evidence by law-enforcement agencies and officials. (True)
- (258) In terms of s 35(5) of the Constitution, evidence obtained in a manner that violates any right in the Bill of Rights *must* be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. (True)
- (259) Section 28(2) of the CPA affords the person who is aggrieved by an unlawful search or seizure, the right to claim compensation in respect of the damage suffered. (False pg 188)



(260) In terms of section 28(1) a police official commits an offence and is liable on conviction to a fine or to imprisonment for a period of not exceeding six months when he acts contrary to the authority of a search warrant issued under section 21. (True pg 188)

(261) Section 49 of the CPA authorises a private person, but not a peace officer, to arrest another person in respect of any offence. (False use of force is only for police officers)

(262) An arrested person has to be brought to a police station as soon as possible after his arrest. (True pg 147)

(263) One of the objectives of Child Justice Act is for the protection of the children's rights as provided in the Constitution. (True)

(264) The Child Justice Act, applies to children between the ages of birth to 16 years. (False)

(265) The Act may also apply children between 18 and 21 if the offence was committed when the perpetrator was below the age of 18. (True)

(266) In terms of section 7 of the CJA, a child under the age of 10 years is *doli incapax*, and therefore lacks criminal capacity. (True pg 101 sg)

(267) If a child is arrested on a Schedule 1 offence and has not appeared before a preliminary inquiry, a police official must release him on written notice in to the care of an adult. (True pg 100 sg)

(268) The normal provisions of the CPA in relation to bail do not apply to child offenders. (False pg 101 sg)

(269) If the court finds during the child's bail enquiry that the parents or guardian of the child is unable to afford bail money, it may release the child on bail on conditions not including the payment of money. (True)

(270) If a child is not released on bail, he must be placed in a child and youth centre appropriate to his age. (True)

(271) The objectives of sentencing in terms of section 69 child Justice act are: (False)

1. To encourage the child to understand the implications of his actions and to be accountable for the harm done.
2. To promote individualised response which strike a balance between the circumstances of a child, the nature of the offence and the interest of the society.
3. To promote the reintegration of the child into the family community.
4. To promote children's Justice.



- (272) No child may be subjected to leg irons and handcuffs when appearing in court unless exceptional circumstances warrant such. (True pg 104 sg)
- (273) Every child who is alleged to have committed an offense must be assessed by the probation officer before appearing at the preliminary hearing. (True pg 107 sg)
- (274) The assessment of the child must take place in public. (False)
- (275) The probation officer and the child joined by a parent or guardian of the child. (True)
- (276) The assessment report in terms of section 40 of the CJA must contain the following: (False pg 138 sg)
- (a) The possibility of referring the matter to the children's Court.
 - (b) The appropriateness of diversion.
 - (c) The possible release of a child into the custody of a parent Guardian or an appropriate adult.
 - (d) The possibility of taking the child to prison.
- (277) In terms of section 54 of the CJA, the following factors must be considered when a diversion option is selected: (False pg 141)
- (a) The appropriateness of the level of the diversion option.
 - (b) Child's educational level, cognitive ability and domestic and environmental circumstances.
 - (c) The proportionality of the option recommended or selected to the child's circumstances.
 - (d) The child's home background.
- (278) An unrepresented child must be referred to the legal aid board. (True pg 147)
- (279) No plea will be heard unless the child has had an opportunity to obtain legal presentation. (True)
- (280) A child may not waive his right legal representation. (True pg 147)
- (281) A child does not have a right of appeal, unless he or she is legally represented. (False)
- (290) In terms of section 172 of the constitution, the competent courts on constitutional matters are: (False)
- (a) The constitutional Court as a Court of final instance.
 - (b) The supreme court of Appeal.
 - (c) The High Court of South Africa
 - (d) The regional court.
- (291) The grounds of reviewing a decision of a lower Court are: (False pg 415-16)
- (a) absence of jurisdiction of the court.



- (b) Interest in the course, bias, Malice, or corruption on the part of the presiding officer.
- (c) Gross irregularity in the proceedings.
- (d) Incomplete record of the proceedings.

- (292) A charge sheet (or indictment) does not necessarily have to disclose an offence in order to be valid. (False)
- (293) An indictment must be served on the accused at most 14 days before the trial. (False)
- (294) It is mandatory for the prosecution to attach a list of witnesses to the charge sheet. (False)
- (295) The prosecution cannot deviate from the information in a charge sheet or indictment. (True)
- (296) In principle, an accused is entitled to access exculpatory documents in the docket. (True)
- (297) Where an accused is charged with a common law offence, the only requirement is that it be named in order for the charge sheet to be valid. (True pg 242)
- (298) Sections 86 and 88 of the CPA make provision for the same action in respect of the correction of a defect in the charge sheet. (True)
- (299) Provided that the accused is not prejudiced, section 86 can be used to replace a charge with another in the same matter. (False)
- (300) The Constitution entrenches the right to a public trial. (True)
- (301) In traditional plea bargaining, the parties bind the court to a certain sentence in return for a guilty plea. (False)
- (302) After pleading, the accused is entitled, without exception, to a verdict. (False)
- (303) During arraignment of an accused, assessors take an oath to deliver a true judgment based on the merits of the case. (True)
- (304) Where the plea of an accused is ambiguous, the court must enter a plea of not guilty and question the accused in terms of section 115 of the CPA. (True)
- (305) Truth and public benefit constitute a valid plea in terms of section 106 of the CPA. (False)
- (306) An accused cannot object to the information in a charge sheet or indictment but can object to the fact that such charge sheet or indictment discloses insufficient detail. (False pg 281)
- (307) In traditional plea bargaining, the parties bind the court to a certain sentence in return for a guilty plea. (False)
- (308) A child justice court can simultaneously serve as a children's court where a child accused is affected by social or welfare issues. (True)
- (309) It is not necessary for the court to question an accused who has pleaded guilty in terms of section 112 of the CPA. (False pg 288)

- (310) Section 115 of the CPA can be used to alter a plea of guilty to one of not guilty where, during the arraignment phases, the court finds that the accused has a defence. (False)
 - (311) The right to a public trial can be validly limited where necessary. (True)
 - (312) In terms of the CJA, open justice is generally limited. (True)
 - (313) A child offender can plead guilty at the preliminary-inquiry stage in terms of section 112 of the CJA. (False)
 - (314) A child offender cannot enter into a statutory or traditional plea bargain. (True)
 - (315) Diversion is a form of plea bargaining. (True para 10.6.3.1 sg)
 - (316) Section 115 of the CPA allows the accused to plead not guilty but to admit to certain elements of the offence. (True pg 295)
 - (317) A plea of guilty in terms of section 122A of the CPA is identical in nature to a plea of guilty in terms of section 106 of the CPA. (False)
 - (318) Section 115 of the CPA can be used to alter a plea of guilty to one of not guilty where, during the arraignment phases, the court finds that the accused has a defence. (False)
 - (319) A plea cannot be changed from guilty to not guilty even if the court is in doubt as to whether or not the accused admits an allegation in the charge. (False)
 - (320) Any number of participants in the same offence may be tried jointly. (True)
 - (321) Any number of accessories after the same fact may not be tried jointly. (False)
 - (322) Refusal to join is an irregularity. (False)
 - (323) A receiver of property obtained by means of an offence shall not be deemed to be a participant in the offence in question. (False 255)
 - (324) In terms of section 332 of the CPA, directors of a company may be charged jointly with the company. (True pg 329)
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MAY/JUNE 2020 ONLINE EXAM

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- 35.2
- 36.3
- 37.2
- 38.2
- 39.2
- 40.4



2020 CPR3701 TEST YOUR SELF MCQ QUESTIONS

1. Open justice can be equated with the concept that justice must be “seen to be done”. **True**
2. Open justice is protected by the right to a fair trial and is an absolute right. **False**
3. The court cannot exclude any member of the public from the trial of an adult accused. **False**
4. In cases where a witness for the state is about to abscond, the prosecutor may apply for a warrant of arrest and have the said witness detained pending the trial. **True** (section 184 of the CPA)
5. Co-accused are ordered numerically. **True**
6. The prosecution decides the numerical order of co-accused at a trial. **True**
7. The court can of its own accord raise the issue of separation. **True** (to avoid the kind of prejudice)
8. The principle of legality is constitutionally entrenched. **True** (rule of law)
9. The principle of equality of arms is founded on equal opportunities being available to both the state and the defence to prove their respective cases. **True**
10. The merits of a case are the cardinal point of the court’s considerations when determining whether to convict or acquit. **True**
11. Where required, the entire judgment of the court must be translated into a language that the accused understands. **True**
12. In cases where the charge pertains to multiple acts or omissions, the court must deliver judgment separately on each individual charge. **True**
13. Some sentences do not constitute punishments. **True** (such as most suspended sentences and a caution)
14. In *Rabie* 1975 (4) SA 855 (A) 862G, the court summarised the general principles of sentencing. **True**
15. Imprisonment, committal to a treatment centre, a fine and correctional supervision are the only sentences that can be imposed by a court. **False**
16. Periodical imprisonment is a form of short-term imprisonment and is also informally known as “weekend imprisonment”. **True**



17. The Constitution secures a general right of review. **True**
18. Fairness no longer entails enquiring whether there was a failure of justice, but whether the trial was fair. **True**
19. Review is more appropriate than appeal in cases where the accused is dissatisfied with the procedures during the trial. **True**
20. There is a general right of appeal in South Africa. **True**
21. The right of appeal is justifiably limited by section 36 of the Constitution. **True**
22. A person can appeal against the sentence imposed or the conviction – not both. **False**
23. The Constitution empowers the President to pardon or reprieve offenders in certain circumstances. **True**
24. The President is empowered to remit any fine, penalty or forfeiture within the confines of the Constitution. **True**
25. The Department of Justice and Constitutional Development has the sole responsibility to expunge records on application by the accused.
26. The notion of “open justice” establishes a protective function in respect of the fair-trial rights of the accused. **True**
27. Open justice can be limited in cases where the accused is in danger of being exposed as a state informant. **True**
28. The accused can testify by way of closed-circuit television in cases where an open trial may cause him or her emotional or physical harm. **True**
29. Witnesses are protected in cases of sexual assault and extortion by way of the court’s discretion to “close the court”. **True**
30. Irrespective of the charge, if a matter relates to an adult accused and complainant, the court cannot exclude the public from the trial in the interests of justice. **False**
31. The court, the prosecutor and the accused all have the power to subpoena witnesses. **True**
32. The advantage of a joint trial is that it saves the state resources and time. **True**
33. Joinder is permissive and not imperative. **True**
34. The decision to separate a trial is at the discretion of the presiding officer. **True**

35. Cross-examination of a witness by the court is permissible within the bounds of reasonableness. **False**
36. The principle of equality of arms can be related to the competence of both the prosecutor and the representative for the defence. **True**
37. An *ex tempore* judgment does not infringe on the right of the accused to a speedy trial. **True**
38. An improper delay in delivering judgment undermines public confidence in the judicial system. **True**
39. Community service as a condition of a suspended sentence is not considered a punishment. **False** (it is a punishment but not a sentence)
40. Most statutory offences are enacted with an attendant penalty clause. **True**
41. Tradition seems to indicate that the state and the accused must supply the information required by the court during trial on sentencing. **True**
42. Compensation and restitution are forms of restorative sentences. **True**
43. Review is not solely the domain of the CPA. **True**
44. The Superior Courts Act does not provide for review in criminal proceedings. **False**
45. Judicial review has a common-law origin. **True**
46. Any conviction, sentence or order of a lower court, and even a discharge after conviction, are subject to leave to appeal. **True**
47. An appeal on the facts relates to the merits of the matter in the trial court. **True**
48. If the appellant files a notice of appeal after the prescribed period, he or she can apply for condonation, although the court is not obliged to grant it. **True**
49. Expungement takes place in one of three ways: automatically, on application or when a certain period has lapsed. **True**
50. The Constitution entrenches the right to a public trial. **True**
51. The right to a public trial can be validly limited where necessary. **True**
52. In terms of the CJA, open justice is generally limited. **True**
53. Open justice can be limited when the complainant is under the age of 18 years. **True**



54. In principle, an accused is entitled to access exculpatory documents in the docket. **True**
55. Where an accused is charged with a common law offence, the only requirement is that it be named in order for the charge sheet to be valid. **False**
56. Sections 86 and 88 of the CPA make provision for the same action in respect of the correction of a defect in the charge sheet. **True**
57. Provided that the accused is not prejudiced, section 86 can be used to replace a charge with another in the same matter. **False**
58. Circuit courts deviate jurisdictionally from the fixed division or seat of court. **True**
59. A child justice court is any court established in terms of the Children's Act 38 of 2005. **True**
60. A child justice court can simultaneously serve as a children's court where a child accused is affected by social or welfare issues. **True**
61. During arraignment of an accused, assessors take an oath to deliver a true judgment based on the merits of the case. **False**
62. Where the plea of an accused is ambiguous, the court must enter a plea of not guilty and question the accused in terms of section 115 of the CPA. **True**
63. Truth and public benefit constitute a valid plea in terms of section 106 of the CPA. **False**
64. An accused cannot object to the information in a charge sheet or indictment, but can object to the fact that such charge sheet or indictment discloses insufficient detail. **False**
65. In traditional plea bargaining, the parties bind the court to a certain sentence in return for a guilty plea. **False**
66. A charge sheet (or indictment) does not necessarily have to disclose an offence in order to be valid. **False**
67. An indictment must be served on the accused at most ~~14 days~~ before the trial. **False**
68. It is mandatory for the prosecution to attach a list of witnesses to the charge sheet. **False**



- 69. The prosecution cannot deviate from the information in a charge sheet or indictment. **False**
- 70. Any number of participants in the same offence may be tried jointly. **True**
- 71. Any number of accessories after the same fact may be tried jointly. **True**
- 72. Refusal to join is not in itself an irregularity. **True**
- 73. Section 115 of the CPA allows the accused to plead not guilty but to admit to certain elements of the offence. **True**
- 74. Statutory plea bargaining can only take place where the accused is represented. **True**
- 75. A child offender cannot enter into a statutory or traditional plea bargain. **False**
- 76. Diversion is a form of plea bargaining. **True**
- 77. It is not necessary for the court to question an accused who has pleaded guilty in terms of section 112 of the CPA. **False**
- 78. A child offender can plead guilty at the preliminary-inquiry stage in terms of section 112 of the CJA. **False**
- 79. Section 115 of the CPA can be used to alter a plea of guilty to one of not guilty where, during the arraignment phases, the court finds that the accused has a defence. **True**
- 80. After pleading, the accused is entitled, without exception, to a verdict. **False**
- 81. Sections 77 to 79 of the CPA apply to child offenders. **False**
- 82. A court will, in principle, grant a postponement to allow the accused an opportunity to find work in order to pay for legal representation. **False**
- 83. There are limitations to the length of time for which a child justice proceeding can be postponed. **True**
- 84. A fair trial includes the right to a speedy trial. **True**
- 85. Section 336 of the CPA provides that, where an act constitutes an offence under a statutory and a common law provision, the accused can be convicted and sentenced under either the statutory or common law provision. **True**
- 86. There is no consensus on the part of South African courts as to whether the conduct of a perpetrator that occurs over a long period of time should form the subject of a single conviction or multiple convictions. **True**



87. A court can order the removal of a trial from one venue to another venue if the court deems it necessary or expedient. **True**
88. In a division of the high court, the presiding judge has discretion to sit with or without assessors. **True**
89. A court of appeal can only interfere with the sentence of a lower court where that court (the lower court) failed to exercise its discretion judicially in a proper and reasonable manner. **True**
90. An appeal court is ordinarily loath to interfere with the findings of a trial court on questions of fact. **True**
91. If an appellant who has noted and prosecuted his or her appeal fails to appear, the court may summarily dismiss the appeal as a consequence of non-appearance. **True**
92. A court of appeal can hold an inspection *in loco*. **True**
93. For purposes of appeal, it is important to have a reliable record of the proceedings of the trial court. **True**
94. A division of the high court has jurisdiction over all persons who reside or are present within its area of jurisdiction, and it has the power to hear and determine appeals from all lower courts within its area of jurisdiction and to review the proceedings of all such courts. **True**
95. A fugitive convicted person may not appeal. **True**
96. Where the grounds of appeal contain several issues and conflicts of fact, it is important for the magistrate to know what the issues are in order for him or her to deal with them in the reasons for judgment. **True**
97. Where an appeal is not noted within the time periods indicated by the Criminal Procedure Act and the Magistrates' Courts Act, the court can condone the lateness and allow the appeal to proceed. **True**
98. An appeal brought under section 327 (CPA) must be disposed of by a division of the high court with appeal jurisdiction after each party is afforded the opportunity to present oral argument in open court. **False**
99. The prosecution, in line with the English approach, may prosecute an appeal on the facts. **True**



100. The Constitution empowers the President to pardon or reprieve offenders. **True**
101. During the opening of the State's case, before any evidence is led, the prosecutor is entitled to address the court for the purpose of explaining the charge and indicating the evidence intended to be adduced for the prosecution. **True**
102. In the case of an adult offender, it is possible for his or her record to be expunged automatically, on application or after a fixed period. **True**
103. In the case of a child offender, his or her record is expunged automatically at the age of 18. **False**
104. When an accused person challenges the correctness of his/her conviction and/or sentence by a lower court, the correct procedure to be followed is that of review. **False**
105. In order to reconstruct a lost record, the recalling of witnesses who gave evidence during the trial would be irregular. **False**
106. When a review judge directs a query to the magistrate who presided over the criminal case under review, the latter may at any time when it suits him/her and in any manner respond to such a query. **False**
107. All courts have the power to exclude improperly obtained evidence and this power ~~does not fall exclusively~~ within the jurisdiction of courts of review and appeal. **False**
108. If the magistrate, in a procedurally correct manner, performs his/her functions in a proper and regular way but comes to a wrong conclusion on the merits, no application may be made to the court of appeal before conviction. **True**
109. A question of law arises only when the facts upon which the trial court based its judgment could have a legal consequence other than that which the trial court found. Accordingly, whether the trial court's factual findings are right or wrong is the only relevant factor in order to determine whether the court erred in law. **False**
110. A third party who has an interest in a verdict of guilty or in a subsequent order has no *locus standi in iudicio* to appeal. **True**



111. Leave to appeal is not required where the convicted person was, at the time of the commission of the offence, at least 14 years of age but below the age of 21 years, was not assisted by a legal representative at the time of conviction in a regional court, and was sentenced to any form of imprisonment as contemplated in section 276(1) that was not wholly suspended. **True**
112. Before any evidence is led, the prosecutor is entitled to address the court for the purpose of explaining the charge and opening the evidence intended to be adduced for the prosecution, but without comment thereon. **True**
113. In a criminal trial, an accused may decide to present his/her evidence either *viva voce* or by means of a written statement. **True**
114. Where a charge is defective for want of an averment which is an essential ingredient of the relevant offence, the defect can be cured by evidence at the trial proving the matter which should have been averred. **True**
115. Section 86 makes provision for amendment of the charge and requires that the proposed amendment must differ to such an extent from the original charge that it is in essence another charge. **False**
116. When the accused is called upon to plead to a charge and it appears uncertain whether he or she is capable of understanding the proceedings at the trial so as to be able to make a proper defence, an enquiry into his or her mental state must be made by the court, with the assistance of a ~~general medical practitioner~~. **False** (medical superintendent of a psychiatric hospital)
117. Where an accused at a summary trial pleads not guilty, the presiding officer must inform the accused that he or she is not obliged to answer any questions. **False** (the presiding official may ask him whether he wishes to make a statement indicating the basis of his defence)
118. An accused, or his or her counsel on behalf of the accused, may admit any fact placed in issue. **True**
119. Open justice can be limited where a witness is in danger of being exposed as a state informant. **True**
120. The notion of open justice establishes a protective function in respect of the fair-trial rights of the accused. **True**



121. In general, the accused is entitled to access exculpatory documentation in the docket. **True**
122. Where the legal adviser replies in writing or orally to any question by the court in terms of section 115(3), the accused must also confirm this, but the court may not require the accused to answer the questions personally. **True**
123. At the trial in the regional court of an accused on a charge of murder, the judicial officer must summon two assessors to assist him or her, unless the accused requests that the trial proceed without assessors. **False**
124. Section 112 can be used when an accused pleads guilty to a serious or less serious offence. **True**
125. It is possible for the accused to issue a written statement in terms of section 112. **True**
126. Only the accused person appears in the dock. **True**
127. Where persons are jointly charged, the mere possibility of prejudice is not sufficient to justify an order for separation of trials in such a case. **True**
128. Persons charged with separate offences alleged to have been committed at the same time and place, or at the same place and about the same time, may be tried jointly where the prosecutor informs the court that evidence admissible at the trial of one person will also be admissible as evidence at the trial of another person or persons. **True**
129. If the accused's refusal to plead is accompanied by such improper behaviour that it obstructs the conduct of the proceedings of the court, the court may order his or her removal and direct that the trial proceed in his or her absence. **True**
130. When the accused is called upon to plead to a charge, and it appears uncertain whether he or she is capable of understanding the proceedings at trial so as to be able to put forward a proper defence, an enquiry into his or her mental state should be made. **True**
131. Statutory plea bargaining in terms of section 105A of the Criminal Procedure Act means that the prosecutor can now reach an agreement with the defence on the sentence to be imposed. **True**

132. The indictment must be served on the accused in accordance with the rules of court. Service is complete the moment that the indictment is posted to the accused and received by him or her. **True**
133. A charge sheet containing the following averments complies with all necessary requirements in terms of section 84(1) of the Criminal Procedure Act 51 of 1977: "That the accused is guilty of unlawfully and intentionally killing Joey Smith, an adult female on the 21st of January 2001 at Groenkloof in the district of Pretoria." **True**
134. Where an accused is convicted of both driving under the influence of liquor and reckless driving, and both counts are based on the same facts, this would not constitute an incorrect duplication of convictions. **True**
135. If assessors abscond during the trial without good reason and the magistrate continues with the trial without them, this amounts to a fatal irregularity which vitiates the proceedings. **True**
136. Generally, where an accused is caught selling dagga, he or she may be convicted only of selling and not also of possession of the rest of the unsold dagga. **False**
137. The court must enter a plea of not guilty if the accused refuses to plead or answer directly to the charge. **True**
138. If the totality of the accused's criminal conduct can be accommodated in one single charge, the accused may not be convicted on multiple charges. **True**
139. An accused can now be found guilty even though the indictment does not disclose an offence, as long as the evidence proves the offence. **True**
140. Section 86 of the Criminal Procedure Act makes provision for amendment of the charge and not for its replacement by an altogether new charge. **True**
141. The rule against the splitting of charges has in fact always been directed at the duplication of convictions and was designed to apply in the field of punishment. **True**
142. Where an accused is charged with both rape and incest arising from the same act of intercourse, he will be convicted of both. **True**

143. If an assault is committed pursuant to or in the course of an attempt to escape, the accused should be convicted of one of these offences only. **False**
144. The prosecution or the accused may apply for the recusal of an assessor. **True**
145. Threatening a judicial officer will materially affect his or her impartiality, and his or her refusal to recuse himself or herself on this ground is therefore irregular. **False**
146. An accused may plead truth and public benefit where the charge is one of criminal defamation. **True**
147. It is regular for a court to put questions directly to an accused who is represented. **True**
148. The right to silence has been greatly and negatively affected by the introduction of the “plea explanation” procedure at arraignment in terms of section 115 of the CPA. **False**
149. In the case of traditional plea bargaining, the prosecutor and the defence cannot bind the court to a sentence. However, the prosecutor may agree to suggest a possible lighter sentence to the court. **True**
150. After the accused has brought an application for a separation of trials, a **proper refusal** to order a separation of trials will amount to an infringement of the accused’s right to a fair trial. **False**
151. An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question. **True**
152. The general principle is that the conducting of criminal trials should take place in open court and in the presence of the accused. **True**
153. A criminal trial commences once an accused has pleaded in a court which has the required jurisdiction to hear evidence. **True**
154. The phrase “in the course of a criminal trial” refers to all procedures which may or must be followed from the time the accused has pleaded until a verdict on the merits. **True**
155. A criminal trial can be broadly described as a state-sponsored, public, judicial and primarily oral hearing. **True**



156. The seven fundamental principles which govern a criminal trial are trial fairness, legality, judicial impartiality, equality of arms, judicial control, orality and finality. **True**
157. At the end of a criminal trial, the court must consider and deliver its verdict based on the state's ability to satisfy its burden of proof. **True**
158. An extempore judgment is one in which the court postpones its judgment owing to the complexity of the merits. **False**
159. It is generally impossible for the accused to be convicted on another charge where the prosecutor manages to prove the elements of that crime as opposed to the crime as charged at the trial. **False**
160. In cases where the accused is not legally represented, the court will be slow to conclude that the absence of a warning concerning the applicability of competent verdicts renders the trial unfair. **True**
161. A sentence is any measure applied by a court to the person convicted of a crime and which finalises the case, except where specific provision is made for reconsideration of that measure. **True**
162. All penalty clauses providing for the imposition of a fine must be read together with Act 105 of 1997. **False** (Adjustment of Fines Act 101 of 1991)
163. In practice, after conviction, the accused indicates his or her previous convictions. **False** (after conviction, the State will indicate whether the accused has any previous convictions)
164. Tradition dictates that the accused provides the information required by the court during the trial for the purpose of sentencing. **False**
165. The law is a precise instrument and therefore any consideration of what is deemed *cruel, inhumane and degrading conduct* is based on the certainty of doctrinal law. **True**
166. Declaration as a dangerous criminal is a sui generis sentence which negates the traditional jurisdiction of the district court. **True**
167. A habitual criminal is one considered by society to be potentially harmful. **True**



168. Periodical imprisonment is a form of imprisonment where the convict serves periods of his or her sentence on an outpatient basis at a psychiatric institute. **False**
169. An accused who is dissatisfied with the decision of a lower court on fact or law may bring the matter before a division of a higher court by way of appeal or review. **False**
170. Judicial review is a process which allows a court to set aside a statute or provision on the grounds of unconstitutionality. **True**
171. No right, whether entrenched or not, is absolute. **True**
172. Constitutional matters include issues of interpretation, protection or enforcement of the Constitution. **True**
173. The criteria for an acceptable limitation of rights are prescribed by section 39 of the Constitution. **False**
174. If an adult accused wishes to appeal the decision of a lower court, no leave to appeal is required. **False**
175. When it is alleged in a lower court that a law is constitutionally invalid, the decision as to invalidity rests with the lower court, subject to review by a higher court on the basis of section 171 of the Magistrates' Courts Act. **False**
176. Owing to the supreme nature of the Constitution, direct access to the Constitutional Court is permitted regarding any issue relating to a procedural irregularity. **False**
177. It is a general rule that there is no appeal before conviction. **True**
178. Provided that the accused is not prejudiced, section 86 can be used to replace a charge with another in the same matter. **False**
- 179.
- 180.
181. During arraignment of an accused, assessors take an oath to deliver a true judgment based on the merits of the case. **False** (Before the trial commences, the assessors must take an oath that they will give a true verdict)
182. Where the plea of an accused is ambiguous, the court must enter a plea of not guilty and question the accused in terms of section 115 of the CPA. **True**



183. Refusal to join is not in itself an irregularity. **True**
184. Statutory plea bargaining can only take place where the accused is represented. **True**
185. An appeal court is ordinarily loath to interfere with the findings of a trial court on questions of fact. **True**
186. A court of appeal can hold an inspection *in loco*. **True**
187. For purposes of appeal, it is important to have a reliable record of the proceedings of the trial court. **True**
188. A division of the high court has jurisdiction over all persons who reside or are present within its area of jurisdiction, and it has the power to hear and determine appeals from all lower courts within its area of jurisdiction and to review the proceedings of all such courts. **True**
189. the President to grant any person either temporary amnesty or immunity. **True**
190. In the case of an adult offender, it is possible for his or her record to be expunged automatically, on application or after a fixed period.pp **True**
191. In the case of a child offender, his or her record is expunged automatically at the age of 18. **False**
192. When an accused person challenges the correctness of his/her conviction and/or sentence by a lower court, the correct procedure to be followed is that of review. **False**
193. Before any evidence is led, the prosecutor is entitled to address the court for the purpose of explaining the charge and opening the evidence intended to be adduced for the prosecution, but without comment thereon. **True**
194. In a criminal trial, an accused may decide to present his/her evidence either viva voce or by means of a written statement. **True**
195. In the case of traditional plea bargaining, the prosecutor and the defence cannot bind the court to a sentence. However, the prosecutor may agree to suggest a possible lighter sentence to the court. **True**
196. After the accused has brought an application for a separation of trials, a proper refusal to order a separation of trials will amount to an infringement of the accused's right to a fair trial. **False**

197. An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question. **True**
198. The general principle is that the conducting of criminal trials should take place in open court and in the presence of the accused. **True**
199. Generally, where no preparatory examination has been held, the indictment must be accompanied by a summary of the salient facts of the case in order to inform the accused of the allegations against him or her. **True**
200. When the accused is called upon to plead to a charge, and it appears uncertain whether he or she is capable of understanding the proceedings at trial so as to be able to put forward a proper defence, an enquiry into his or her mental state should be made. **True**
- 201.
202. The indictment must be served on the accused in accordance with the rules of court. Service is complete the moment that the indictment is posted to the accused and received by him or her. **True**
203. Where a charge is defective for want of an averment which is an essential ingredient of the relevant offence, the defect can be cured by evidence at the trial proving the matter which should have been averred. **True**
204. Section 86 makes provision for amendment of the charge and ~~requires that the proposed amendment must differ~~ to such an extent from the original charge that it is in essence another charge. **False**
205. Where an accused at a summary trial pleads not guilty, the presiding officer must inform the accused that he or she is not obliged to answer any questions. **False** (the presiding official may ask him whether he wishes to make a statement indicating the basis of his defence)
206. An accused may plead truth and public benefit where the charge is one of criminal defamation. **True** (section 107 of the CPA)
207. The right to a fair trial includes the right to a prosecutor who acts without fear, favour or prejudice. **True** (Bonugli v Deputy National Director of Public Prosecutions)



208. Section 186 of the Criminal Procedure Act empowers the court to recall witnesses who have previously testified at the trial so that they can be examined by the court. **False**
209. In terms of section 63(4) of the Child Justice Act, the court may not interfere in the cross-examination of a child. **False** (opposite is true)
210. The court must control and manage the proceedings within the bounds of the law and without sacrificing its impartiality. **True**
211. The presiding officer must make sure that the accused understands the language used by a witness. **True**
212. The principle of finality demands that the state and the accused have an opportunity to reopen their cases where they previously failed to examine evidence introduced in the main trial. **False**
213. Cross-examination partly by the accused and partly by his or her legal representative must be avoided. **True**
214. Section 174 (CPA) provides that, if there is no chance that the accused will incriminate himself or herself during his or her defence, he or she must be discharged from prosecution. **False**
215. The so-called “Shuping test” is the constitutional test for section 174 (CPA). **True**
216. An accused may not be discharged at the end of the state’s case if there is a possibility that he or she will incriminate himself or herself during his or her defence. **False**
217. The constitutional right of the public to justice demands that an application in terms of section 174 (CPA) be denied if there is a reasonable possibility that the accused will discharge the burden of proof in his or her defence. **False**
218. In order to definitively prove the innocence of the accused, the defence may proceed with its case even where the court has granted a section 174 (CPA) discharge. **False**
219. The accused must be informed of the charge against him or her in sufficient detail to answer it. **True**
220. If there is no proof that the accused was a perpetrator or co-perpetrator or accomplice in the crime charged, he or she may be convicted as an accessory

- after the fact to the crime charged should there indeed be proof that he or she acted in such capacity. **True**
221. The court is *functus officio* after delivery of judgment. **True**
222. Section 176 is primarily aimed at a situation where a court inadvertently sentences the accused to punishment which, on further consideration, is too harsh. **True**
223. A court has a wide-ranging sentencing discretion. **True**
224. *Rabie* 1975 (4) SA 855 emphasised the role of the criminal, the crime and society in the implementation of punishment. **True**
225. If a court is satisfied that substantial and compelling circumstances exist which justify a lesser sentence, it must deviate from the sentence prescribed. **True**
226. After previous convictions have been proven, the accused is entitled to lead evidence in ~~aggravation~~ of sentence. **False**
227. As a general principle, young offenders are sentenced more leniently than adults. **True**
228. A person convicted time and again for similar offences will progressively be punished more severely. **True**
229. One of the first decisions of a sentencing court is whether to remove the offender from society or to punish him or her within the community. **True**
230. Ordinary imprisonment for a term determined by the court is the most common form of imprisonment. **True**
231. Life imprisonment can only be imposed by a division of the high court, unless the Criminal Law Amendment Act 105 of 1997 allows a regional court to impose imprisonment for life. **True**
232. The Criminal Procedure Act provides that any reference in a statute to a minimum period of imprisonment of more than three months must be construed as a reference to a period of exactly three months. **False**
233. Courts do ~~not~~ have a wide discretion with regard to the imposition of a fine as a form of sentence. **False**
234. Sections 287(2), 288 and 289 of the Criminal Procedure Act provide the means by which fines may be recovered. **True**



235. In terms of section 172 of the Constitution, the Supreme Court of Appeal is a competent court as a court of first instance on a constitutional matter. **False**
236. In terms of section 172 of the Constitution, an association acting in the interests of its members lacks *locus standi* in the Constitutional Court. **False**
237. Any person may, by way of the action procedure, approach any court to confirm an order of constitutional invalidity. **False**
238. Access to courts competent to hear constitutional matters may be gained by way of leave to appeal. **True**
239. There is a vast difference between appeal and review proceedings, since only one aims at setting aside a conviction or sentence. **True**
240. A review may be brought against the finding of a lower court on any point of law and/or fact, whereas an appeal may only be brought on the ground of a specific procedural irregularity. **False**
241. In an appeal, the parties are confined to what appears on the record, but, in a review, it is permissible to prove any of the grounds for review. **True**
242. A review is generally not permissible on a finding of fact, unless the finding is so unreasonable that it constitutes an irregularity. **True**
243. After the decision in *Ntuli* 1997 (2) SACR 19 (CC), all convicted persons had an absolute or unlimited right of appeal. **True**
244. Evidence of certain formal matters may be given by way of affidavit, but is subject to the right of the opposing party to object to such evidence. **True**
245. Where a magistrate has made a mistake in the recording of the evidence, he/she cannot correct the mistake after sentence as he/she is then *functus officio*. **False** (section 176 creates a very limited exception to this principle)
246. It is accepted practice that the prosecutor in a superior court trial is ~~obliged~~ to call all the witnesses who made depositions at the preparatory examination. **False**
247. Where an accused has more than one legal representative, only one of the representatives is permitted to cross-examine any particular state witness. **True**
248. If an accused's application for discharge at the end of the state's case is successful, the director of public prosecutions (or public prosecutor) may appeal in terms of section 310. **False**

249. The legislature did not specially provide for an “accessory before the fact” as a competent verdict on a charge of having committed an offence. However, such a person can be charged and punished as a principal offender. **False**
250. All sentences should take into account only the (so-called) main purposes of punishment, namely retribution, deterrence, prevention and rehabilitation. **True**
251. In the United States of America, the death penalty itself has not been held to be unconstitutional. **True** (Gregg v Georgia)
252. In terms of the Constitution, the Constitutional Court found the death penalty not to be cruel, inhuman and degrading. **False**
253. Life imprisonment is an indeterminate sentence, because, when it is imposed, it is unknown for how long the offender will be imprisoned. **True**
254. A court may discharge an offender with a mere caution and, although the discharge has the effect of an acquittal, the conviction is still recorded and counts as a previous conviction. **True**
255. A full court is a court of appeal and not a court of first instance, and, consequently, a criminal trial cannot be conducted before such a court. **True**
256. A child justice court is any court properly constituted in terms of the Children’s Act 38 of 2005. **False** (trial or sentencing of a child under the age of 18 years)
257. If a child offender is diverted at the preliminary-inquiry stage, he/she must still appear in a child justice court to confirm his/her acknowledgement of guilt. **False**
258. A child offender will never be subjected to a summary trial, because the preliminary inquiry is designed to exclude this stage of the criminal process. **True**
259. Bail is a form of monetary release from custody. **True**
260. Bail is inherently penal in nature. **False** (Bail is non-penal in character—Acheson 1991)
261. Bail can be used to deter other would-be offenders. **False**
262. During a bail application, the court may consider, as a factor, the prevalence of the type of crime with which the accused has been charged. **True**
263. The accused person’s previous convictions or pending charges are irrelevant for purposes of bail. **True**
264. In limited instances, bail can be granted by the police. **True**

265. In limited circumstances, bail can be granted by the prosecution service. **True**
266. A child offender may be released on bail by an authorised prosecutor prior to the first appearance at a preliminary inquiry. **True**
267. An accused may bring an action for damages where he/she is denied police bail on malicious grounds. **True**
268. Refusal of bail is appealable by the accused. **True**
269. The exceptions to the general rule that a trial must take place in the presence of the accused may include “exclusion of the accused due to the misbehaviour of the accused person’s witnesses”. **False**
270. The exceptions to the general rule that a trial must take place in the presence of the accused may include “the situation where a co-accused applies to court to exclude an accused”. **True**
271. The exceptions to the general rule that a trial must take place in the presence of the accused may include “instances where the accused gives evidence by means of closed-circuit television or similar electronic media”. **True**
272. In general. **True**
 - a trial may take place in the absence of the accused where he/she waives his/her right to attend
 - the verdict and sentence must, notwithstanding (a) above, be handed down in the presence of the accused or his/her duly authorised representative
 - the right to be present can be limited in certain circumstances

OCTOBER/NOVEMBER 2019

SECTION A

Question 1

1. T
2. T
3. F
4. F
5. F
6. F
7. F
8. T
9. F
10. F

SECTION B

QUESTION 2

1. ARREST

a) Use of force in effecting an arrest

As a general rule, force may not be used in order to effect an arrest. If the person that is to be arrested submits himself or herself to the arrest, force may not be used. Therefore, the need to use force can only arise in those circumstances in which the use of force is necessary to overcome resistance to the arrest or to prevent the suspect from fleeing. The use of force in order to punish the person who is to be arrested will always be unlawful.¹

Section 12(1)(c)-(e) of the Constitution² avers that every person shall have the right to freedom and security of the person, which inter alia includes the right to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhumane or degrading way. Hence use of force in effecting an arrest must accordingly be viewed against this background.

¹ Criminal Procedure Handbook 153.

² Constitution of the Republic of South Africa 1996.



Until recently, the use of force in effecting an arrest was governed by section 49(2) of the CPA. This section was stating that the killing of a person who is to be arrested for an offence found in Schedule 1 offences but who could not be arrested or prevented from fleeing by other means than killing him, such killing would be regarded as justifiable homicide.

However, in *Ex Parte: Minister of Safety and Security: In Re S v Walters*³ the Constitutional Court declared the previous s 49(2) to be unconstitutional and repealed and replaced it by the new section 49. This case lays down the factors to be taken into account in using force to effect an arrest.

1. The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
2. Arrest is not the only means of achieving this purpose, nor always the best.
3. Arrest may never be used to punish a suspect.
4. Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
5. Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
6. In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
7. Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
8. Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
9. These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

³ *Ex Parte: Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC).

b) Facts of the scenario

Jake's actions in firing shots at Y and Z do not conform to the Constitutional Court injunction because there is no proportionality because the use of force used and the crime committed. Firing shots directly to the robbers was not the least degree of force Jake could have used. Jake could have fired warning shots instead. The suspects were not posing any threat to Jake, they were fleeing from the scene.

2. Refusal of bail because it will be against the interests of justice

Section 60(4) provides that the refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established, where there is the likelihood that the accused, if released on bail will:

- i. endanger the safety of the public or any particular person or will commit another offence; or
- ii. attempt to evade his or her trial; or
- iii. attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- iv. undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- v. disturb the public order or undermine the public peace or security.

3. Powers of private persons to effect an arrest

In terms of s 42 a private person may, without a warrant, arrest the following persons:

- i. Any person who commits or attempts to commit in his presence or whom he reasonably suspects of having committed a schedule 1 offence;
- ii. Any person whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for the offence;
- iii. Any person whom he is by any law authorised to arrest without warrant in respect of any offence specified in that law. Example, in terms of s 9(1) of the Stock Theft Act a private person may arrest another without a warrant where there is a reasonable suspicion that the latter has committed any one of certain offences created by the Act;
- iv. Any person whom he sees engaged in an affray (group fight); and
- v. The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorised thereto by such owner, etc, may without a warrant arrest the person so found.

QUESTION 3

1. Competent verdicts on an offence of robbery (section 260 of CPA)

- i. assault with intent to do grievous bodily harm; or
- ii. common assault; or
- iii. theft.

2. Five sentences introduced by the Child Justice Act (sections 73-77)

- i. Restorative justice sentences
- ii. Fine or alternatives to fine
- iii. Sentences involving correctional supervision
- iv. Sentence of compulsory residence in child and youth care centre
- v. Sentence of imprisonment

3. Correction of errors and defects in a charge sheet or indictment

Sections 88 and 86 of the Criminal Procedure Act are aimed at correcting mistakes or omissions of an essential nature in the charge sheet or indictment. The connection between these two sections is that errors not rectified by section 86 may be corrected by evidence in terms of section 88. The difference between the two lies in the fact that certain errors or defects in charge sheets may be corrected automatically in terms of section 88, while errors or defects brought to the attention of the court, or noticed by the court itself, cancel the automatic effect of section 88 and must be amended by the court in terms of section 86.

Section 86 allows for the amendment of charge sheets that are defective, where

- i. a material allegation, such as an element of the offence in question, is not reflected in the charge sheet;
- ii. there is a material difference between the allegation in the charge sheet and the evidence that has been led;
- iii. words or particulars that should have been included in the charge sheet are absent;
- iv. words or particulars that should be excluded from the charge sheet are present; and
- v. there is any other type of defect in the charge sheet.

The combined effect of sections 86 and 88 is the following:



- i. Unless it is prejudicial, any amendment to a charge may be made at any time before judgment is passed.
- ii. Inadvertent failure to amend a charge does not affect a verdict of guilty, provided that all the necessary evidence has been adduced.
- iii. A defect in the charge may be adduced on appeal only if the trial court knowingly failed to correct it.

In terms of s 86(1) the court may order an amendment only if it considers that the making of the amendment will not prejudice the accused in his defence. In *Heller*⁴ it was held that a court will be very loath in a summary trial of great complexity which involves a number of counts at a late stage of the proceedings to sanction any radical departure from the indictment for fear of prejudicing the accused.

Section 86 makes provision for amendment of the charge not for replacement thereof by an altogether new charge. The approach to adopt is to establish whether the proposed amendment differs to such an extent from the original charge that it is in essence another charge. If the proposed amended charge does not correspond at all to the original charge, then one can talk of a substitution and not of an amendment. In *Mahlangu*⁵ the court stated that if only the citation of a charge has to be amended and the essentials of the charge will be essentially the same, the defence will not be affected thereby. Should a new charge be framed in the course of a trial, the possibility of prejudice to the accused is strong, the accused comes to court prepared to meet a particular charge, and will now be faced with a different issue.⁶

4. Objectives of sentencing child offenders

- a) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to –
 - i. encourage the child to understand the implications of and be accountable for the harm caused;
 - ii. promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
 - iii. promote the reintegration of the child into the family and community;

⁴ *Heller* 1971 (2) SA 29 (A) at 53C–D.

⁵ *Mahlangu* 1997 (1) SACR 338 (T).

⁶ *Slabbert* 1968 (3) SA 318 (O).

- iv. ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
 - v. use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.
- b) In order to promote the objectives of sentencing referred to in subsection (1) and to encourage a restorative justice approach, sentences may be used in combination.
- c) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, a child justice court must, consider the following:
 - i. Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;
 - ii. whether the harm caused by the offence indicates that a residential sentence is appropriate;
 - iii. the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and
 - iv. whether the child is in need of a particular service provided at a child and youth care centre. The Child Justice Act 75 of 2008 (CJA)
- 4. When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:
 - i. The seriousness of the offence, with due regard to –
 - the amount of harm done or risked through the offence; and
 - the culpability of the child in causing or risking the harm;
 - ii. the protection of the community;
 - iii. the severity of the impact of the offence on the victim;
 - iv. the previous failure of the child to respond to non-residential alternatives, if applicable; and
 - v. the desirability of keeping the child out of prison.

QUESTION 4



1. Constitution of and the manner of arriving at decisions by the High Court as the trial court

Criminal cases in the High Court are tried either by a judge sitting alone or by a judge and one or two assessors. The presiding judge generally has a discretion whether or not to sit with assessors. In terms of section 145(1)(b) of the CPA, an assessor is a person who, in the opinion of the presiding judge, has experience in the administration of justice or skill in any matter which may be considered at the trial.

Usually the judge procures the services of advocates for this purpose, but occasionally magistrates (especially retired magistrates), attorneys and professors of law serve in this capacity. In cases in which expert evidence on a particular topic is expected to be led, the judge may sit with an assessor who is professionally qualified in the field in question (eg in medicine, engineering, accountancy).⁷

To a certain extent, in practice the trial judge is obliged to rely on the recommendation of the director of public prosecutions or a member of his or her staff. In the final analysis, it is the trial judge who has to come to a conclusion in this matter, and the opinion of the director of public prosecutions is but one factor to be taken into account for this purpose, along with other information.⁸

Section 147(1)(a) provides that if an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct that the trial proceeds before the remaining member or members of the court, or that the trial begin de novo.

The assessor's competence or lack thereof can be established objectively.⁹ Pressing commitments elsewhere cannot constitute an inability to act as an assessor within the meaning of the word and the court has no power to dispense with his presence and proceed without him; not even with the consent of the accused.¹⁰ The inability to act in the context of s 147(1) is not applicable to a situation where an assessor is legally incompetent to continue to act in a case because of some act or occurrence which warranted the assessor's recusal.

⁷ Jourbert *Criminal Procedure Handbook* 260.

⁸ *Schoba* 1985 (3) SA 881 (A).

⁹ *Kroon* 1997 (1) SACR 525 (SCA).

¹⁰ *Daniels* 1997 (2) SACR 531 (C).

In terms of this section, where a judge, finds an assessor has become unable to act as such, it is incumbent upon him or her to hear the parties on the question of how the proceedings will be conducted further that is, with one assessor or de novo. In *Malindi*¹¹ it was stated that in general, the parties are entitled to be heard before the judge comes to the decision that an assessor has become unable to act.

Rights and duties of assessors

In terms of section 145(3) and (4) of the Criminal Procedure Act, before the trial commences, the assessors must take an oath that they will give a true verdict, according to the evidence upon the issues to be tried. As soon as this oath has been administered by the judge, the assessors are members of the court with the following provisos:

- i. the decision or finding of the majority of the members of the court upon any question of fact shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;
- ii. If the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor(s) assisting him or her do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he or she may for this purpose sit alone.
- iii. The presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he or she may for this purpose sit alone. In *Magxwalisa*¹² it was held that an application at the close of the State's case for the accused's discharge in terms of s 174 is one of law, and the decision is that of the judge alone.
- iv. A judge presiding at a criminal trial in the High Court shall give the reasons for his or her decision where he or she decides any question of law or whether any matter constitutes a question of law or a question of fact. The judge shall also give the reasons for the decision or finding of the court upon any question of fact or the question referred to in para (ii) above, whether he or she sits with or without assessors. Where the judge sits

¹¹ *Malindi* 1990 (1) SA 962 (A).

¹² *Magxwalisa* 1984 (2) SA 314 (N).



with assessors and there is a difference of opinion upon any question of fact, the judge shall give the reasons for the minority decision.

As soon as an assessor receives information detrimental to the accused which has not been proved in evidence, he must retire from the case. In *Solomons*¹³ the irregularity in the case was that the assessors had gained information that the accused had at an earlier stage of that same evening been involved in knife-assaults. This information did not form part of the evidence at the trial. An assessor must show absolute impartiality: His expressing an opinion about a particular witness before the accused has been called to state his defence, will be grossly irregular.¹⁴

The function of assessors is limited to the hearing of the trial, and since the trial is the determination of the matters put in issue and ends with the verdict, the assessors have no part with the judge in the assessment or the imposition of an appropriate sentence.

Although, it is not irregular for the judge to seek the advice of the assessors in the matter of sentence.

Application to the scenario

The presiding officer sat with two assessors and there is disagreement on the finding. Section 147 avers that the decision or finding of the majority of the members of the court upon any question of fact shall be the decision or finding of the court. Therefore, the decision of the assessors as the members of the court outweigh that of the presiding officer.

2. *Audi alteram partem*

This principle means to hear the other side. No ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their view (*Suliman*). This principle is consistent with section 35(3)(i) of the Constitution which states that every accused has the right to adduce and challenge evidence.

3. General principles of sentencing

Rabie (Triad of Zinn):

¹³ *Solomons* 1959 (2) SA 352 (A).

¹⁴ *Stone* 1976 (2) SA 279 (A).



- i. Punishment should fit the criminal;
- ii. Fit the crime; and
- iii. be fair to society, and be blended with a measure of mercy according to the circumstances.

All sentences should take into account the main purposes of punishment, namely retribution, deterrence, prevention and rehabilitation. Of these purposes deterrence has for a long time been considered the most important. The process which should ensure that every sentence fits the criminal as well as the crime and is fair to society is known as **personalisation (or individualisation) of punishment**. This process is considered to be the main reason for leaving sentencers with such a wide discretion.

4. Difference between appeal and review procedure when constitutional issues are not exclusively involved:

- a) An appeal may be brought against the findings of a lower court on any point of law and/or fact. Whereas, a review can be brought only on the ground of specific procedural irregularities.
- b) In an appeal the parties are confined to what appears on the record, but in a review it is permissible to prove any of the grounds for review (including alleged irregularities that do not appear on the face of the record) by affidavit so as to show that the judge had an interest in the cause or that he acted maliciously or corruptly (*Mwambazi* 1991).
- c) A review is not generally permissible on a finding of fact unless that finding is so unreasonable that it constitutes an irregularity. While any question of law or fact, or any gross irregularity appearing on the face of the record, may be raised by means of an appeal, the accused who brings the matter before the court by way of review is confined to the specific grounds for review. On review he will not be allowed to argue that the presiding officer went wrong on a point of law, unless the error affected one of the grounds for review.
- d) While an appeal must be brought within a certain time, there is no such limit in the case of a review. However, a court of review will not condone the bringing of the matter under review after an unreasonable period has elapsed since conviction.
- e) Appeal is tantamount to a retrial on the record, while in the case of a review, facts can be brought to the notice of the court by means of an affidavit in order to prove the irregularity, and the enquiry is then whether the proceedings have been in accordance with justice and/or whether the accused has been prejudiced by the irregularities in the proceedings.

- f) A court has no inherent appellate jurisdiction and its powers on appeal are statutorily limited. It is therefore not possible to invoke the court's appellate powers by any means other than those set out in the relevant statutory provisions. Only the superior courts enjoy inherent review jurisdiction. The court's inherent review jurisdiction is overriding and may be invoked irrespective of the relief procedure instituted. When considering an appeal or a statutory review, the court may resort to its inherent review jurisdiction.
- g) An appeal is lodged by way of an application for leave to appeal, whereas a review is sought by way of a notice of motion whereby the respondents are called upon to show cause why the decision or proceedings should not be reviewed and corrected or set aside.

MAY/JUNE 2019

SECTION A

QUESTION 1

1. F 153
2. T 158
3. T 52
4. F 76
5. F 241
6. F 277
7. F
8. T (355)
9. F
10. F (336)

SECTION B

QUESTION 2

1.a) In *Ex Parte, Minister of Safety and Security In re: Sv Walters* 2004 the Court had to decide the Constitutionality of section 49(2) of the CPA. The court held that insufficient proportionality existed between the employment of deadly force in effecting an arrest and broad list of offences contained in Schedule 1. The court gave factors that should be considered by police officials when performing arrests, and these are;

- The purpose of the arrest is to bring before court for trial persons suspected of having committed offences,
- Arrest is not the only means of achieving this purpose, nor always the best
- Arrest may never be used to punish a suspect,
- Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest,



- Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used,
- In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offences the suspect is suspected of having committed, the force being proportional in all these circumstances,
- Shooting a suspect solely to carry out an arrest is permitted in very limited circumstances
- Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at the time or later, these limitations in no way detract the rights of an arrest or attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

2.The actions of X in firing at Y and Z does not conform to the decision of the Constitutional court in that X,s actions did not take into consideration the factors discussed above that arresting should not be used as punishment, and that an arrest should be used as a way of bringing a suspect or accused person to court. That extreme force should only be used in limited circumstances only where it is reasonably necessary, that shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at the time or later, these limitations in no way detract the rights of an arrest or attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

- c) Release on bail may not be in the interest of justice where one or more of the following grounds are established;



- Where there is the likelihood that the accused, if released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence
- Where there is the likelihood that the accused, if released on bail, will attempt to evade his or her trial,
- Where there is the likelihood that the accused, if released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence, or
- Where there is the likelihood that the accused, if released on bail, will undermine the or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, or
- Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

The above grounds must be evaluated in conjunction with various factors surrounding each particular case.

3. Section 42 of the Act provides that a private person may arrest without any arrest warrant any person

- a. Who commits or attempts to commit in his presence, or who he reasonably suspects of having committed any offence referred to in Schedule 1, the private person may pursue that person and any other private person to whom the purpose of the pursuit has been made known may join and assist therein
- b. Who he reasonably believes to have committed any offence and to be escaping from and freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence.
- c. Any person whom he is by law authorized to arrest without warrant in respect of any offence specified in that law, for instance a private person may arrest another without a warrant where there is reasonable suspicion that the latter any of certain offences created by law

- d. Whom he sees engaged in affray.
- e. The owner, the lawful occupier or any person in charge of property, or a person authorized thereto by the such owner, may without a warrant arrest the person so found.

QUESTION 3

1. Section 260 of the CPA determines competent verdicts in a charge of robbery or attempted robbery. Some of the competent verdicts are assault with intent to do grievously bodily harm, common assault and theft. Robbery is the only charge where an accused can be convicted of two other crimes if the single robbery charge is not proved, the two latent charges of assault and theft as competent verdicts.

2. Five sentences introduced by the Justice Act 2008 are;

- Compulsory residence in a care centre
- Correctional supervision
- Community based sentence
- Suspension of sentence
- Postponement of sentence

3. A defect in the charge sheet or indictment maybe cured by evidence in terms of section 88 of the CPA, or section 86 if it has been raised by any of the parties in the court proceedings before the judgment. Section 88 provides for the automatic cure of a defect at any time before judgment. The state or prosecutor cannot rely on section 88 if the defect is brought to the court's notice by any of the parties before judgment.

Section 86 is aimed at requests by the state to the court to amend a defect, allegation or omission in the charge at any time before the judgment. Thus section 86(1) makes provision for the amendment of an indictment or charge sheet in the following situations;

- Where it is defective for want of an essential averment
- Where there is variance between averment and evidence offered



- Where words or particulars have been omitted
- Where any other error is made.

Thus the court may order an amendment if it considers that the amendment will not prejudice the accused in defence. The charge sheet is not amended this shall not unless the court has refused to allow amendment affect the validity of the proceedings.

4. The objectives of sentencing a child offender in terms of the Child Justice Act 2008 are to:

- Encourage the child to understand the implications of and be accountable for the harm caused,
- Promote an individualized response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of the society,
- Promote the reintegration of the child into the family and community,
- Ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of integration, and
- Use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

QUESTION 4

1. Where the judge of the High Court presides over a matter together with assessors in superior courts the following principles must apply.

- A decision or finding on fact is taken by the majority of the court – in the case of one assessor, the judge rules in the case of a difference of opinion
- The presiding judge alone shall decide upon questions of law or whether a matter constitutes a question of law or fact.
- In a criminal trial the judge shall give reasons for his decision on questions of law or whether any matter constitutes a question of law or question of fact. He shall also give reasons for a finding upon a question of fact or the question in para 2 whether he sits with or without assessors but if there is

a difference of opinion on such questions if he sits with assessors he shall give reasons for the minority decision.

2. The *audi alteram partem* rule is a principle meaning hear the other side. In general this means that no ruling or decision can be given by a court of law without giving the contesting parties the opportunity to express their views or provide evidence in support of their cases. Both parties must be given the opportunity to express their views, and it is incumbent upon the presiding officer to then use the available evidence heard in open court in the presence of the accused and he should have no communication whatsoever with either party except in the presence of the other or any witness except in the presence of both parties. Section 25(3)(d) provides that every accused has the right to adduce and challenge evidence, and challenge evidence against him.

Evidence must be given on oath, a solemn affirmation in lieu of an oath or upon an admonition to speak the truth. The presiding judicial officer, judge or registrar may administer the oath in respect of witnesses, but the prosecutor may not do so. An interpreter may be used in the presence of the judge or magistrate. Witnesses must be allowed to give evidence in their own words in their own way and at their own tempo. All these procedures should confirm the fairness to both parties.

3. In *S v Rabie* 1975 the general principles of sentencing were summarized as follows, "punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." Thus the elements of crime, the offender and interests of society (triad of Zinn) must be observed. A sentence should take into account the main purposes of punishment which are retribution, deterrence, prevention and rehabilitation.
4. The differences between an appeal and review procedure when constitutional issues are not exclusively involved are basically the following;



- An appeal may be brought against the findings of a lower court on any point of law and fact. A review in terms of the Superior Courts Act, can be brought on the ground of specific procedural irregularities.
- In an appeal the parties are confined to what appears on the record, but in a review it is permissible to prove any of the grounds for review.
- A review is not generally permissible on a finding of fact unless that finding is so unreasonable that it constitutes an irregularity. Any question of law, fact or irregularity appearing on the record maybe raised by an appeal.
- An appeal must be brought within a certain time, there is no such limit in the case of a review, although a review after an unreasonable time may not been condoned.
- Appeal is tantamount to a retrial on record, while review facts can be brought to the notice of the court by means of an affidavit in order to prove the irregularity.
- A court has no inherent appellate jurisdiction and its powers on appeal are statutorily limited. On the other hand superior courts enjoy inherent review jurisdiction.
- An appeal is lodged by way of an application for leave to appeal, whereas a review is is sought by way of a notice of motion whereby the respondents are called upon to show cause why the decision or proceedings should not be reviewed or set aside.

OCTOBER/NOVEMBER 2018

SECTION A

Question 1

1. True (pg. 246)
2. False (pg. 283)
3. True (pg. 52)
4. False (pg. 284)
5. False (pg. 241)
6. False
7. False (pg. 466)
8. True (pg. 355)
9. False (pg. 35)
10. False (pg. 38)

SECTION B

Question 2

- a. In private prosecutions the following persons may, subject to certain other procedural requirements conduct a prosecution in respect of such offence in any court;
 - Any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence
 - A husband, if the said offence was committed in respect of his wife



- The wife or child or, if there is no wife or child, any of the next of any deceased person, if the death of such person is alleged to have been caused by the offences
 - The legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward.
- b. In terms of first bullet point Belligerent Ben has *locus standi* if can prove substantial and peculiar interest in the issue
- c. Section 7 of the CPA provides for a *nolle prosequi* which is a private prosecution. In order for private prosecution to succeed a certificate *nolle prosequi* must be issued and produced. A certificate *nolle prosequi* is a certificate signed by the DPP, in which he confirms that he has examined the statements or affidavits and that he has declined to prosecute. Failure to lodge a certificate *nolle prosequi* is a material defect and amounts to non-compliance. A person instituting a private prosecution must also provide security that they will prosecute the charge to the conclusion without undue delay.
- d. Section 9(1) provides that before commencement of private prosecution the private prosecutor must deposit an amount that serves as security that the individual will prosecute the charge to the conclusion without delay.

ALTERNATIVE

Question 2

- a. Section 90 of the Magistrates Courts Act lays down that a district court and regional court have jurisdiction to hear trials of persons who are charged with an



offence committed with the district or of the regional division respectively. It provides that

- Where it is uncertain in which of the several jurisdictions an offence has been committed, it may be tried in any of the jurisdictions.
- A person charged with an offence maybe tried by the court of any district or any regional division, as the case may be, wherein any act, omission or event which is an element of the offence took place.
- A person charged with theft of property or with obtaining property by an offence, or with an offence which involves the receiving of any property by him, may also be tried by the court of any district or regional division, as the case maybe, wherein he has or had part of the property in his possession.
- A person charged with kidnapping, child stealing or abduction may also be tried by the court of district or any regional division, through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.
- Whereby any special statutory provision a magistrate's court has jurisdiction in respect of an offence committed beyond the local limits of the district such court is not deprived of such jurisdiction by any of the provisions of section 90 of the Magistrates Court Act.
- Page 41

Question 3

1. The South African Constitution section 205(3) spells out the police mandate and provides that investigating crimes is one of them. Once the police become aware that a crime has been committed the police is empowered to investigate in-order



to obtain information relating to the alleged commission of the crime. The police may therefore interrogate possible suspects and witnesses without requiring any other provisions except the Constitution which confers special powers on the police.

However section 26 and 27 of the CPA gives the police special powers to enter private premises without a warrant for the purposes of interrogating and obtaining statements from persons whom they reasonably believe may furnish information related to the commission of any crime. Section 27 in turn empowers the police official describe in section 26 to use force as maybe reasonably necessary to overcome any resistance. In addition section 41 confers certain powers on the police officers such as to ask any person they have power to arrest, any person reasonably suspected of having committed any offence, any person who may in his opinion be able to give evidence in regard to the commission or suspected commission of any offence, to furnish their name and address, if the person refuses to arrest and detain them for a period not exceeding twelve hours until a name and address is furnished and verified. The refusal and the furnishing of wrong particulars constitutes an offence and is punishable by a fine and imprisonment. Legislation also allows the police to detain persons in certain serious offences.

1. Section 26 and 27 of the CPA gives the police special powers to enter private premises without a warrant for the purposes of interrogating and obtaining statements from persons whom they reasonably believe may furnish information related to the commission of any crime. Section 27 in-turn empowers the police official describe in section 26 to use force as maybe reasonably necessary to overcome any resistance. In addition section 41 confers certain powers on the police officers such as to ask any person they have power to arrest, any person reasonably suspected of having committed any offence, any person who may in his opinion be able to give evidence in regard to the commission or suspected commission of any offence, to furnish their name and address, if the person refuses to arrest and detain them for a period not exceeding twelve hours until a



name and address is furnished and verified. The refusal and the furnishing of wrong particulars constitutes an offence and is punishable by a fine and imprisonment.

2. The categories are as follows;

- Any person whom he has power to arrest'
- Any person reasonably suspected of having committed any offence or of having attempted to commit any offence, and
- Any person who may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence.

If such person refuses to arrest him forthwith and detain him for a period not exceeding twelve hours, until the name and address is furnished and verified.

Question 4

- a. Section 68(6)(b) of the National Road Traffic Act which prohibits possession without lawful cause of a motor vehicle of which the engine or chassis number has been falsified or mutilated. Section 89(1) which also makes it any offence to be in possession of the motor vehicle described under 68(6)(b). The police official therefore may in terms of section 22 read with section 20 of the CPA search without a warrant any person or container or premises for purposes of seizing any article referred in section 20, if the person concerned consents to the search and seizure of the article in question, or if the police officer on reasonable grounds believes a search warrant will be issued, or that delay in obtaining the warrant would defeat the object of the search. Section 205(3) of the Constitution provides police mandate as to combat, prevent and investigate crimes and maintain public order as some of police duties. When exercising these powers a



police official is protected by section 39 the interpretation clause which is as per the court's finding not overly restrictive to require of police to comply strictly. Thus a police official can seize property and confiscate it in terms of the above provisions.

- b. The provisions of the CPA under discussion are sections 20 and 22. Section 20 provides that the state may seize anything a) which is concerned, or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, b) which may afford evidence of the commission or suspected commission of an offence, or c) which is intended to be used or is on reasonable ground suspected of being intended to be used in the commission of an offence. On the other hand section 22 of the CPA provides that a police official may in search and seize articles without a search warrant any person or container or premises for purposes of seizing any article referred in section 20, if the person concerned consents to the search and seizure of the article in question, or if the police officer on reasonable grounds believes a search warrant will be issued, or that delay in obtaining the warrant would defeat the object of the search.
- c. Spoliation remedy or *mandament van spolie*.
- d. A preservation order is an official order by the court that prohibits a person from dealing in any manner with any property which is an instrumentality of an offence. An example would be property used in the commission or suspected commission of an offence.

ALTERNATIVE

Question 4

1. Section 84(1) sets out the requirements with which a charge sheet and indictments should comply with as follows;
 - A charge/indictment shall set forth the relevant offence in such a manner and with such particularity as to the time and place at which the offence was committed and against whom and the property if any as reasonably sufficient to inform the accused of the nature of the charge.
 - Where particulars referred to above are unknown to the prosecutor it shall be sufficient to state the fact in the charge sheet.
 - In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.
 - In the case of common law offences the offence must be described in clear legal terms, and if legal appellation for the exists, it must be set by such appellation, or otherwise it should strictly and accurately described.
2. The term indictment is used in connection with prosecutions conducted in a division of the High Court. When a prosecutor decides to indict an accused in the High Court, the indictment is lodged with the registrar of the High Court. The indictment where no examination has been conducted with a summary of salient facts of the case in-order to sufficiently inform the accused of the allegations against them, provided this is not prejudicial to the administration of justice. The indictment must then be served on the accused in accordance with the rules of the court. Service of indictment together with a notice of trial must take place at least ten days excluding Sundays and public holidays before the date of trial. Service is effected in terms of rules of court. On the other hand a charge sheet is used in the lower courts. Unlike an indictment a charge a trial commences with the lodgment of a charge sheet with the clerk of court. A charge sheet is not served on the accused but is rather presented in court and the accused may

examine the charge sheet at any time during the proceedings. That's the accused is brought to court not using the charge sheet but either on written notice, arrest or summons.

MAY/JUNE 2018

SECTION A

Question 1

1. False
2. False
3. True
4. False pg 75
5. False pg 137
6. False
7. False
8. False pg 282
9. False
10. False pg 335

SECTION B

Question 2

1 The general principle is that South African courts will exercise jurisdiction with regard to offences committed on South African territory only as confirmed by the Constitutional Court case of Kaunda and Others v President of the RSA where it held that it is a general rule of international law that the laws of a state ordinarily apply only within its own territory. Some of the exceptions are;

- A charge of theft which is a continuing offence committed in a foreign state.

- Occasionally South Africa courts may exercise jurisdiction in respect of offences committed extra-territorial jurisdiction if statute law allows. An example of is section 35 of the Prevention and Combating of Corrupt Activities Act of 2004 which provides for extra-territorial jurisdiction of South African courts even if corrupt activities were committed outside South Africa borders. The courts will have jurisdiction if certain jurisdictional facts are proved such as citizenship, residual or that the accused was present in South Africa.

Therefore yes the courts may hear and try the case based on the two given exceptions.

2. The district court has jurisdiction to try all crimes except treason, murder, rape and compelled rape. A district court may even try some serious offences against the state. A regional court may try all crimes except treason but may try murder and rape.
3. Section 6(a) of the CPA 1977 provides for circumstances under which the prosecution may withdraw a charge before the accused as pleaded to such a charge. This does not mean the accused is acquitted since the prosecution is not prohibited from bringing the same or related charges when new evidenced is discovered. Before an accused pleads, the prosecution can also withdraw a summons and issue another. A DPP may not at any time after the accused has pleaded but before conviction, stop the prosecution in respect of that charge. If this is done the accused is entitled to an acquittal (section 6(b)). This means the accused may not subsequently be prosecuted on the same facts again. The accused can raise a defence of *autrefois acquit* (previous acquittal)
4. Section 7 of the CPA provides for a *nolle prosequi* which is a private prosecution. In order for private prosecution to succeed a certificate *nolle prosequi* must be issued and produced. A certificate *nolle prosequi* is a certificate signed by the DPP, in which he confirms that he has examined the statements or affidavits and that he has declined to prosecute. Failure to lodge a certificate *nolle prosequi* is a material defect and amounts



to non-compliance. A person instituting a private prosecution must also provide security that they will prosecute the charge to the conclusion without undue delay.

5. In terms of section 35 of the Constitution of South Africa 1996 arrested, detained and accused persons have right to;

- arrested persons – to be promptly informed of the right to remain silent, the consequences of not remaining silent
- detained persons –
- every accused person has a right to a fair trial, to be presumed innocent etc

6.a) Section 20 CPA confers powers to search only where the object of the search is to find a certain person or to seize an article which falls into one of the following classes of articles including documents which may be seized by the state in terms of the provisions of the CPA. These are;

- Articles which are concerned in or on reasonable ground believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere.
- Articles which may afford evidence of the commission or suspected commission of an offence within the Republic or elsewhere.
- Articles which are intended to be used or are on reasonable ground believed to be intended to be used in the commission of an offence.

The exception relates to documents which are privileged. In *Prinsloo v Newman* documents consisting of communications between attorney and client were held that it may not be seized.

6.b) The household goods and furniture therefore cannot be seized unless if the fall into one of the three classes listed under answer 6a.



7.a) The formal document that will be prepared by the prosecution for court proceedings in the lower court is the charge sheet. Section 84(1) of the CPA sets out the requirements with which the a charge should comply with. It provides as follows;

- The charge shall set forth offence alleged to have been committed against whom and the property, sufficiently to inform the accused of the nature of the charge
- If particulars are unknown to the prosecutor this shall be stated in the charge sheet.
- Description of any statutory offence in words of the law creating the offence shall be sufficient.

7.b) In the High Court an indictment is used. The DPP must lodge with the registrar of the High Court in the name of the DPP and informs the court that the accused is guilty of the crime stated therein. Where no preparatory examination has been held the indictment must be accompanied by the summary of the salient facts of the case in order to inform the accused of the allegations against him. The indictment must also be served on the accused in accordance with the rules of the court. A list of names and addresses of persons the DPP intends calling must be supplied, unless the DPP is of the opinion that the accused will temper with witnesses. Service of the indictment together with notice of trial must take place at least ten days before the date of the appointment of the trial.

8. A defect in the charge sheet or indictment maybe cured by evidence in terms of section 88 of the CPA, or section 86 if it has been raised by any of the parties in the court proceedings before the judgment. Section 86 is aimed at requests by the state to the court to amend a defect, allegation or omission in the charge at any time before the judgment. Thus section 86(1) makes provision for the amendment of an indictment or charge sheet in the following situations;

- Where it is defective for want of an essential averment
- Where there is variance between averment and evidence offered

- Where words or particulars have been omitted
- Where any other error is made.

Thus the court may order an amendment if it considers that the amendment will not prejudice the accused in defence. The charge sheet is not amended this shall not unless the court has refused to allow amendment affect the validity of the proceedings.

9. If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is;

- In law guilty of the offence to which he has pleaded guilty is satisfied that
- The accused does admit an allegation in the charge or
- The accused has incorrectly admitted any such allegation
- The accused has a valid defence to the charge or
- The court is of the opinion for any other reason that the accused's plea of guilty should stand

The court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution and the conviction automatically lapses.

10. Section 204 of the CPA deals with immunity accorded to accomplices who give satisfactory evidence for the state in criminal proceedings. If the state informs the court that any person called as a witness on behalf of the state will be required to answer questions which might incriminate him, the court must inform such witness that he will be obliged to answer such questions but that if he answers frankly and honestly, the court must discharge him from prosecuting. (*Suliman v National Directorate of Special Operations 2010*)

11. An accused person has a passive defence right and is under no obligation to assist the prosecution in its case. Thus an accused may choose to exercise their right to passive defence and no negative inference must be drawn from such passive defence.

CPR3701 Exam Notes

1. TRIAL: INDICTMENTS AND CHARGE SHEETS

Discuss sections 88 and 86(1) that provide for the amendment or correction of a (10)

X is charged with the reckless driving of a vehicle. After X has pleaded at the trial, it turns out that the prosecutor failed to mention an important element of the offence in the charge sheet, namely that it took place on a public road. How can the prosecutor correct this oversight? (10)

Errors not rectified by section 86 can be corrected by evidence in terms of section 88. The difference between the two lies in the fact that certain errors or defects in charge sheets can be corrected automatically in terms of section 88, while errors or defects brought to the attention of the court or noticed by the court itself cancel the automatic effect of section 88 and have to be amended by the court in terms of section 86, at the state's request.

Correction of errors in charge

*Section 86 allows for the **amendment of charge sheets** that are defective:*

1. Where it is defective for want of an essential element;
2. Where there is material difference between the allegation in the charge sheet and the evidence that has been led
3. Where words have been omitted or unnecessarily inserted or any other error is made.

Court may order an amendment only if it considers that the making of the amendment will not prejudice the accused in his defence. There won't be prejudice if there is only a slight variance or where it is clear that the defence would have remained exactly the same had the state originally presented the charge in the amended form.



Where application to amend the charge is made on appeal the court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary particulars. On appeal the court would accede to an application for the amendment of a charge only if it were satisfied that there was no reasonable doubt that the appellant would not be prejudiced which will depend upon the facts and circumstances of each case.

Section 86 makes provision for the amendment of the charge and not replacement thereof by an altogether new charge. If the proposed amendment doesn't correspond at all to the original charge, then we talk of substitution and not amendment. Should a new charge be framed in the course of a trial, the possibility of prejudice to the accused is strong as he comes to court prepared to meet a particular charge and now will be faced with a different issue.

Section 86(4) provides that the fact that the charge is not amended doesn't affect the validity of the proceedings, unless the court has refused to allow the amendment. If the failure to amend would not have prejudiced the accused in his defence, the failure to effect the amendment will not invalidate the proceedings. Because Section 88 allows for defects to be cured by evidence, the need for amendments has largely fallen away, except where the want of an essential averment was brought to the notice of the court in which case the automatic cure in s88 does not become operative and the charge will have to be amended.

Defect in charge cured by evidence

Section 88 provides that where a charge is defective for the want of an averment which is an essential element of the relevant offence, the defect shall unless brought to the notice of the court before judgment be cured by evidence at the trial proving the matter which should have been averred, in which event the corrective effect of the evidence will be cancelled.



This means that the accused can now be found guilty even though the indictment does not disclose an offence as long as the evidence proves the offence. This alleviates the burden of prosecutors, but is open to criticism:

The offence should at least be named in the charge, and the formulation must be such that the charge sheet in fact embodies the offence because before pleading, the accused may except to the charge.

If the accused brings the defect to the court's attention before judgment and it refuses to amend the charge, the accused can rely upon the defect on appeal if convicted by the trial court.

A defect can only be cured by evidence proper, not by the invocation of statutory provisions and presumptions. The replies of an accused who has pleaded guilty to questioning may be treated as evidence capable of curing a defect in the charge. Section 88 doesn't authorise replacement of one offence by another offence proved by evidence (eg. Substitution of 'meat' for 'jersey' in a theft charge would amount to substitution of a charge)

In terms of section 123, the DPP is authorised to rectify a fatal defect in the case for the state by converting a summary trial into a preparatory examination.

The combined effect of Section 86 and 88: Unless it is prejudicial, any amendment to a charge can be made at any time before judgment is passed; Inadvertent failure to amend a charge doesn't affect a verdict of guilty, provided that all the necessary evidence has been adduced; A defect in the charge can only be adduced on appeal if the trial court knowingly failed to correct it.

(i) See Above

(ii) See Above

(iii) See below

X and Y commit an armed robbery at a commercial bank. They shoot a security guard, P. When P falls to the ground, Y kicks him in the face, takes his wallet from his pocket, along with P's weapon, and flees together with X. P dies and X is caught and brought to court on charges of

- (1) robbery
- (2) murder
- (3) theft
- (4) assault
- (5) the statutory crime of pointing a firearm

X pleads not guilty and objects to the charges, which according to him, amount to a splitting of charges. The court rejects X's objection. The prosecutor asks that Y, who has been arrested in the meantime, be joined on the same charges. X and Y are found guilty on all charges.

(i) Discuss the question whether the joinder of Y on all charges is an irregularity or not. (5 marks)

Section 155 provides that any number of participants in the SAME OFFENCE may be tried together, as well as any number of accessories after the fact to an offence, or both participant and accessories in respect of the same offence. Section 156 provides that whenever it is alleged in a charge that two or more persons have committed separate offences at the same time and place, or at about the same time, and the Prosecutor informs the court that any evidence which is in his opinion admissible at the trial of one of those persons is also admissible at the trial of the other person or persons, such persons may be charged jointly for those offences on that charge. In terms of section 157(1) if any evidence has been led before the joining of accused then X and Y may not be joined. The replies to the questioning of the accused are not evidence in terms of s 157(1). Therefore the joinder of Y on all charges is not an irregularity.



(ii) Discuss, and then test with reference to relevant legal principles, whether the conviction of X and Y on all charges does not amount to an irregular duplication of convictions. (10 marks)

. The accused may be charged with having committed all or any of the offences and any number of offences may be tried at once.

. The "duplication of convictions" rule is aimed at preventing an accused from being convicted and sentenced more than once for the same culpable fact.

"It is a fundamental principle of our law that an accused should not be convicted and sentenced in respect of two crimes when he or she has committed only one offence. It forms part of the right to a fair trial which is enshrined in the Constitution" Whitehead 2008 (1) SACR 431 (SCA).

. The prosecutor can bring as many charges as he deems fit. Charges must be relevant to the facts. "The State is entitled to duplicate charges" Whitehead.

. In Grobler, it was held that section 83 deals with the procedure which may be adopted in statutory and common law principles regarding conviction and punishment and the real prejudice lies in multiple convictions and not so much in multiple charges.

. In Whitehead the court stated:

There is no infallible formula to determine whether or not, in any particular case, there has been a duplication of convictions. The various tests that have been formulated by our courts are not rules of law, nor are they exhaustive. They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court. It has always been accepted that a logical point of departure is to consider the definitions of those offences in regard to which a possible duplication might have taken place.

The rule against the duplication of convictions is to be approached on the basis of the following tests:

(1) A single act constitutes more than one statutory offence, or statutory and common law offences

(2) A single act constitutes more than one offence at common law

In respect of both (1) and (2), section 336 provides that where an act (or omission) constitutes an offence under two or more statutory provisions or is an offence against a statutory provision and the common law, the perpetrator may be prosecuted and punished under either the statutory provision or the common law. The perpetrator may not, however, be liable to more than one punishment for the act or omission constituting the offence.

Application to the facts

The single act in the scenario (robbery) constitutes more than one statutory offence or statutory and common law offence (murder, robbery and pointing a firearm the latter also constitutes assault). The question is whether the alleged offences of robbery and pointing a firearm constitute undue duplication in terms of section 336? Yes.

Obviously, if one regards the charge of pointing a firearm as constituting the assault charge, then section 336 indicates a duplication between the charges of pointing a firearm, murder and robbery, **Wegener case**. If the pointing of a firearm is seen solely as a statutory offence and part of the bank robbery, there is duplication in terms of section 336.

(3) More than one act of the same nature or more or less the same nature is committed practically simultaneously, this constitutes more than one offence (whether a statutory or a common-law offence).

When the totality of the accused's criminal conduct can be accommodated in a single charge, the accused may not be convicted of multiple charges.

Here the following tests are applied by the courts:

- (i) Were the acts done with a single intent and were they part of one continuous transaction? or
- (ii) Does the evidence required to prove one charge necessarily involve proof of the other?

The tests are in the alternative: They need not both be answered in the affirmative. If the answer to only one of the questions is in the affirmative, it is said to be an improper splitting/duplication. Obviously the courts must apply common sense too.

In *Grobler*, the court stated the following:

Insofar as the "single intent" and "continuous transaction" test is concerned, the distinction between motive and intent and the different intents inherent in different offences must not be overlooked ... If a person breaks into a room intending to steal from the occupiers and does so at one and the same time it might be said that in substance he committed only one offence. Assuming he enters and steals the goods of the first person while he is asleep and then proceeds to the next person who awakes after his property has been stolen. In order to silence this person the accused renders him unconscious with a blow to the head. The third person is awakened, and the accused then forcibly deprives him of his goods before departing. Common sense suggests that the accused may properly be convicted of housebreaking with intent to steal and theft, assault and robbery.

Application to the single intent test:

The acts in the scenario, excluding the kicking of P and the theft of the purse, which happened as afterthoughts after the robbery, are all closely related. The single intent both X and Y had was to rob the bank and the murder happened as a foreseeable act in a *dolus eventualis* situation. In other words it was foreseeable that someone could get killed where guns are involved. As stated above, if one regards the charges of murder, robbery and pointing a firearm as offences committed with a single intention, then the facts point to a duplication between the charges of pointing a firearm, murder and robbery and X and Y may only be convicted of murder or robbery. However, the



offences of murder and robbery are mutually exclusive when the following test is applied:

The evidence test:

[I]f the evidence necessary to prove one criminal act necessarily involves evidence of another criminal act, those two are to be considered as one transaction. But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes (*R v Van der and approved in Whitehead*).

Application to the evidence test:

It would not be a duplication of convictions if the evidence test were applied because the evidence on the robbery charge does not necessarily prove the murder charge as the elements of the offences differ and the one does not prove the other, *Benjamin and Moloto*. The evidence on the robbery does prove the charge of pointing a firearm.

(4) Conduct of the perpetrator is spread over a long period of time and amounts to a continuous repetition of the same offence.

This category is not relevant in respect of the question.

Discuss the splitting of charges or duplication of convictions and substantiate your discussion with examples from case law. (12)

A single act constitutes more than one offence at common law

Examples:

- (i) Where an accused was found stripping lead from a roof intending to steal it, he could be convicted of theft but not also of malicious injury to property.
- (ii) Where an accused was charged with rape and incest arising from the same act, he could only be convicted of one.

(iii) Where 2 people are killed in the same road accident, it is improper to convict the accused on 2 counts of culpable homicide. A single charge should refer to both deceased.

More than one act of the same nature or of more or less the same nature is committed practically simultaneously, constituting more than one offence (whether a statutory or common-law offence). The ultimate rule is that the court must judge whether, according to the difference in nature and degree of the facts, one or more offences have been proved. In *Kuzwayo* it was pointed out that there are borderline cases which may not be covered precisely by the tests and, therefore, whether the actions of an accused amounts to more than one offence must be judged in each case on the basis of “sound reasoning and the court’s perception of fairness”. Where the nature of the separate acts that have been committed and the intent with which each act has been committed differ to such an extent that it is impossible to accommodate all the acts within one offence only, conviction on multiple charges would not constitute an improper duplication of convictions. Examples:

- (i) If an accused, in the act of committing rape, tears the victim’s jacket, he may not be convicted of rape and malicious injury to property. But should the accused after the completion of the rape take the victim’s purse which has dropped from her jacket, the accused commits the further act of theft.
- (ii) If a man breaks into a house with intent to steal and thereupon commits theft from the house, he should only be charged with housebreaking with intent to steal and theft, but where a burglar breaks into different flats in one block, this is different offences.
- (iii) If an assault is committed pursuant to, and in the course of, an attempt to escape, the accused should be convicted of only one of these offences.
- (iv) Where an accused drives under the influence of alcohol and through his negligent driving causes the death of other persons, he may be convicted of culpable homicide and driving under the influence of intoxicating liquor.

Conduct of the perpetrator is spread over a long period of time and amounts to a continuous repetition of the same offence

- (i) Once it is established that someone is wrongfully practicing as a medical doctor, each act of treating a patient is a separate contravention.



(ii) Where an accused has stolen goods from 2 complainants living in the same room he can only be convicted on one charge of theft.

2. THE COURT

Discuss the rights and duties of assessors. (5)

X stands trial in a High Court on a charge of murder. She is tried by a judge, assisted by two assessors. After the closing of X's case, it becomes apparent that members of the court do not agree on the finding. Discuss the legal principles concerned. (6)

Criminal cases in superior courts are tried either by a judge sitting alone or with one or two assessors. An assessor is a person who in the opinion of the judge has experience in the administration of justice or skill in any matter which may be considered at trial. In cases where expert evidence is expected to be led the judge may sit with an assessor who is professionally qualified in the field in question.

Rights and duties of assessors.

Before the trial commences, the assessors must take an oath that they will give a true verdict, according to the evidence upon the issues to be tried. As soon as an oath has been administered by the judge, the assessors are members of the court, subject to the following provisos:

1. A decision or finding on fact is taken by the majority of the court – in the case of one assessor, the judge rules in the case of a difference of opinion
2. The presiding judge may decide that it would be in the interests of justice that the assessor(s) do not take part in any decision on the admissibility of evidence of a confession or statement made by the accused.
3. The presiding judge alone shall decide upon questions of law or whether a matter constitutes a question of law or fact.
4. In a criminal trial the judge shall give reasons for his decision on questions of law or whether any matter constitutes a question of law or question of fact. He shall also give reasons for a finding upon a question of fact or the question in



para 2 whether he sits with or without assessors but if there is a difference of opinion on such questions if he sits with assessors he shall give reasons for the minority decision.

(i) Yes. At trial in a regional court of an accused on a charge of murder the judicial officer must summon 2 assessors to assist, unless the accused requests that the trial proceed without assessors in which case the judicial officer may in his discretion summon one or two assessors.

The prosecutor or the accused may apply for the recusal of the assessor. The presiding officer may, at any stage before the completion of the proceedings, order the recusal of the assessor from the proceedings if he is satisfied that:

- (i) the assessor has a personal interest in the proceedings;
- (ii) there are reasonable grounds for believing that there is likely to be a conflict of interests as a result of the assessor's participation in the proceedings;
- (iii) there are reasonable grounds for believing that there is a likelihood of bias on the part of the assessor;
- (iv) the assessor is absent for any reason; or
- (v) the assessor has died.

The assessor may also request his own recusal based on (i)-(iii) above. The court will give the prosecution and the accused opportunity to address arguments on the issue of the assessor's recusal and the assessor may respond. The presiding officer is obliged to give reasons for his order of recusal of the assessor and may, in the interest of justice, direct that the proceedings continue before the remaining members; or begin **de novo** (anew); or be postponed upon the return of the assessor (where he has been absent).

Discuss the rules and principles that apply in respect of an application for the recusal of the presiding judicial officer. (5)



X should of made an application for the recusal of the judicial officer (or assessor) which should, if possible, be made at the commencement of the trial in order to obviate unnecessary complications, such as a discontinuation of a partly heard trial and the necessity of starting it de novo. If unavoidable, such an application may be made in the course of the trial – **Siber 1952**. The requirements of the test for judicial bias are:

- 1) There must be a suspicion that the judicial officer *might be, and not would be*, biased.
- 2) The suspicion must be that of a reasonable person in the position of the accused.
- 3) The suspicion must be based on reasonable grounds.
- 4) The suspicion is one which the reasonable person referred to *would*, not *might* have held.

The Principle involved in an application for recusal, is that no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner – **Herbst**. The criterion for recusal is objective. Thus, it is the reasonable perception of the parties as to the impartiality of the judicial officer that is important. The fact that the judicial officer was impartial or is likely to be impartial is not the test. The presiding officer should be an impartial, open minded and uninformed adjudicator in the sense that he takes cognisance of only those facts about the case which are proven in court in the usual way – **Sibeko**

It is a clear rule of law that no person who has an interest in or harbours any prejudice in respect of the matter to be tried should adjudicate on such matter. Should a judicial officer refuse to recuse himself in a case where he should properly have done so, his refusal would create a good ground for review of the case.

A relationship with one or other of the parties to a case affords grounds for recusal, but the mere fact that the judicial officer and the accused belong to different race groups will not amount to grounds for recusal. It has been held that a magistrate is not disqualified



because previously in his judicial capacity he dealt with a similar charge against the accused. The mere fact that the judicial officer has knowledge of facts obtained in civil proceedings in which the accused was concerned does not disqualify him from presiding at the subsequent criminal trial.

Nor does knowledge of the accused's previous convictions disqualify the judicial officer from trying the case.

It will be preferable for the judicial officer to recuse himself if it could not be said that the accused could not harbour a reasonable fear that the court would reject his evidence because of a finding on his credibility in another trial. A judicial officer should not recuse himself unless he has asked the defence to make its submissions. A judicial officer who recuses himself becomes ***functus officio*** (no longer in office), the whole trial becomes void and a new trial will be instituted – the accused may not claim that he has been acquitted or found guilty.

With a special entry, the X may request during or after the trial, that the irregularity be entered on the record. The trial judge will have to consider the application based on the alleged irregularity and 2 types of irregularity are possible:

(i) Those *relating* to the trial, for example, where an assessor gains extra-curial information that could be

detrimental to the accused; and

(ii) Those that arise *during* the trial, for example, the refusal of a judge to allow proper cross-examination.

Section 317(1) provides that if an accused thinks that the proceedings in the High Court are irregular, he may, during the trial or within 14 days after the conviction, apply for a special entry to be made on the record, stating in what respect the proceedings are alleged to be irregular or unlawful. If a special entry is made on the record and the accused is convicted, he may appeal to the Supreme Court of Appeal against conviction on the ground of the irregularity, within 21 days after the entry was made. If the application for a special entry is refused, the accused may petition the President of the Supreme Court of Appeal within 21 days of refusal for a special entry to be made on the record. The accused's conviction and sentence are not to be set aside by reason of the



irregularity, unless it appears that a failure of justice has in fact resulted from the irregularity. The question then is whether the irregularity is of the kind that *per se* vitiates the proceedings – **Moodie**, or which requires that on the evidence and credibility findings, unaffected by the irregularity there was proof of the accused’s guilt beyond a reasonable doubt – **Naidoo**

Discuss impartiality of and fairness to the accused by a judicial officer (14)

The concept of justice in its procedural sense is closely related to legality. It does not matter whether the accused is guilty or not, the only question is whether the basic right to a fair trial has been affected by an irregularity to such an extent that it can be said that justice was not done. According to *Mabuza* the standards which the judicial officer should maintain include;

- The court must not conduct its questioning such that its impartiality can be questioned or doubted
- The court should not take part in the case to such an extent that its vision is clouded and then unable to adjudicate properly
- The court should not intimidate or upset a witness or accused so that answers are weakened or credibility shaken
- The court should control the trial such that impartiality, fairness etc is evident to all

Judicial officers or judges must base their decisions solely upon evidence heard in open court in the presence of the accused and such officers should have no communication with either party or witnesses in a case before him except in the presence of both parties. Evidence must be given under oath or upon solemn affirmation in lieu of an oath or serious admonition to speak the truth.

The Criminal Procedure Act lays down certain rules of procedure which should be observed, but the trial is otherwise subject to the management of the judicial officer presiding over it.

Impartiality and courtesy

Judicial officers must endeavour to be absolutely fair to both the prosecution and the defence. The individual has the right to equality before the law and to equal protection of the law. (s8 of the Constitution). Impartiality denotes a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by evidence and submissions.

In *Jacobs* two witnesses who had initially stated that they did not know the accused, having been threatened by the magistrate with a whipping in the cells unless they told the truth, then identified the accused. On the review it was held that this was a serious irregularity and a failure of justice per se and the conviction was set aside. The court stated that while it is true that it is a function of a criminal court to determine the guilt or innocence of the accused, it performs this function in accordance with certain accepted norms of procedure. These involve inter alia the concepts of fairness to the accused, courtesy to witnesses and an adherence to certain civilised standards of behaviour. Every criminal court is, therefore, presupposed to be impartial. Witnesses and the accused shouldn't be addressed by means of the impersonal terms "witness" and "accused", but rather by their surname. It is disrespectful and degrading to address an adult as a juvenile (ie address him by his first name).

Audi Alteram Partem

Both parties must be given the opportunity to express their views. Section 25(3)(d) provides that every accused has the right to adduce and challenge evidence.

Decisions solely upon evidence; the oath

The judicial officer must base his decision solely upon evidence heard in open court in the presence of the accused and he should have no communication whatsoever with either party except in the presence of the other or any witness except in the presence of



both parties. He may also not take notice of documentary information contained in the docket, which has not been tendered into evidence. Evidence must be given on oath, a solemn affirmation in lieu of an oath or upon an admonition to speak the truth. The presiding judicial officer, judge or registrar may administer the oath in respect of witnesses, but the prosecutor may not do so. An interpreter may be used in the presence of the judge or magistrate. Witnesses must be allowed to give evidence in their own words in their own way and at their own tempo.

Fairness to the accused

Where the accused is undefended, the court should ensure that the accused is aware of his rights at all times. These rights have to be explained by the presiding judicial official. The accused rights include the right to cross examine in the language of choice, putting of his defence to state witnesses, to call witnesses, to produce relevant documents, to record evidence, to present argument to court and to make representation regarding sentence.

Presiding officer needs to be patient and courteous at all times. It is a general principle that the court is not entitled to question the accused on the merits of the case unless he testifies under oath. The accused may offer a defence of silence. After an accused has been convicted the court is entitled to know of previous convictions in order to assist in sentencing. During the trial all knowledge of previous convictions should be kept from the court since it could prejudice the accused. The accused will not be entitled to complain of inferential knowledge of previous convictions or disclosure by the defence. However if this information is improperly disclosed the conviction can be set aside unless the court of appeal is satisfied that no failure of justice has occurred.

3. ARRAIGNMENT AND PLEA OF THE ACCUSED

(i) Not guilty

Explanation of plea – where an accused pleads not guilty the presiding official may ask the basis of his defence. Where the accused does not make a statement or does so but it is not clear the court may question the accused to ascertain which allegation to the charges are in dispute. However the court must inform the accused that he is not



obliged to answer any questions. The court may put questions to clarify any matter but the questions should not go beyond the matters in issue and limited to those issues in which the accused's statement is unclear. A conviction will be set aside where the court's questioning bordered on cross examination. It is important to bring attention to the accused that the statement in clarification of the plea is not evidence under oath.

Accused participation – it is irregular for a court to put questions directly to an accused who is represented and his legal representative may answer questions in terms of s 115(3). Where a legal advisor replies on behalf of the accused, the accused is to declare whether he confirms it or not. What an accused says in explanation of plea may not be used against a co-accused except when presented under oath in which event it is in fact evidence. S115 has a dual purpose – an indication to indicate the basis of his defence and questioning as to ascertain which allegations of the charge are in dispute.

The procedure in essence – the plea explanation procedure in s s115 must be approached with great caution. Its purpose is to shorten proceedings by making it unnecessary for the prosecutor to call evidence on matter not in dispute. In most cases a judicial officer will ask the accused the basis of his defence but extensive questioning of the accused will result in the setting aside of the proceedings on appeal. S 115 does not contemplate any cross examination but an objective attempt at determining the facts that are in dispute.

After the accused is convicted, the court is entitled to know of the previous convictions of the accused in assessing the proper punishment, but during the trial, all knowledge of previous convictions must be withheld from the court.

The prosecution is only in exceptional cases entitled to prove previous convictions before verdict, such as where the accused has attacked the character of a State witness. **If it is improperly revealed during the trial that the accused has previous convictions, the accused will not be entitled to complain** of inferential knowledge of previous convictions or disclosure by the defence **as the conviction will generally be**



set aside unless the court of appeal is satisfied that no failure of justice has resulted from such disclosure.

If such knowledge is revealed by the defence, it will as a rule not invalidate the conviction. knowledge of the accused's previous convictions disqualify the judicial officer from trying the case. **In Khambule and Njikaza** it was considered a serious irregularity for court to ask the accused whether he had any previous convictions, if State doesn't produce a list of previous convictions. The court cannot exercise its discretion properly if all the information necessary to make such a decision is not at the court's disposal.

(ii) No. An appeal to a high court is subject to leave to appeal except in the instances below, where an appeal may be noted without having to apply for leave to appeal.

Where the convicted person was in terms of the CJA at the time of the commission of the offence-

1. below the age of 16 years; or
2. 16 years or older but under the age of 18 and sentenced to any form of imprisonment that was not wholly

Suspended or

3. Life imprisonment by a regional court

Write brief notes on those instances when a plea by an accused may be dispensed with. (7)

1. Refusal to plead

The court shall enter a plea of not guilty if the accused will not plead or answer directly to a charge, such a plea has the same effect as if the accused had actually pleaded. A case cannot be postponed to a later date and then brought on before such date and the accused being required to plead, refuses to do so - the matter should stand down until the later date because the accused may be prejudiced in his right to request further particulars or to object to the charge sheet. To insist that an accused plead after he has informed the court that he wishes to consult with a legal representative is a departure



from established rules of procedure and in conflict with his fundamental right to have a legal representative.

2. Ambiguity in charge plea

If the accused does not plead directly or pleads guilty with reservation then a not guilty plea should be entered.

3. Obstructive and rowdy behaviour

If a refusal to plead is accompanied by behaviour that obstructs the conduct of the court, the court may order removal and the trial continue in his absence. However a warning should be given before doing this since the accused might change his mind.

4. Mentally abnormal accused

If the accused, when asked to plead, appears uncertain for any reason whether he is capable of understanding the proceedings, an enquiry into his mental state should be made by a qualified person. The court may also direct an enquiry by three persons – medical superintendent, court appointed psychiatrist, accused appointed psychiatrist and the accused may be committed to a psychiatric hospital for 30 days at a time. If the finding is unanimous and not disputed the court may determine the matter without hearing further evidence. If the finding is not unanimous or disputed, the court must determine the matter after hearing evidence.

5. Objections to the charge

S85(1) provides that an accused may before pleading object to the charges on the ground that the charge–

1. does not disclose the relevant offence,
2. or an essential element of the offence,
3. does not contain sufficient particulars,
4. Accused not correctly named or described.
5. does not comply with provisions of the Act

Reasonable notice must be given to the prosecution that the accused intends to raise an objection. If upheld the court may order the charge to be amended or particulars delivered to the accused. If the prosecution does not oblige, the court may quash the charge.

Mentally abnormal accused

If, when the accused is called upon to plead, it appears to be uncertain whether he is capable of understanding the proceedings so as to make a proper defence, an enquiry into his mental state should be made in accordance with the procedure laid down in Sections 77 and 79. The investigation is made by the medical superintendent of a psychiatric hospital designated by the court or by a psychiatrist appointed by him, at request of the court. In any particular case, the court can direct that the investigation be made by 3 persons:

- (i) the medical superintendent (or his designate);
- (ii) a psychiatrist appointed by the court who is not in the full time service of the state; and
- (iii) a psychiatrist appointed by the accused (if he chooses).

For the purposes of this enquiry, the accused may be committed to a psychiatric hospital for up to 30 days at a time. The report of the enquiry must include a diagnosis of the mental condition of the accused and a finding whether he is capable of understanding the proceedings so as to make a proper defence.

If the finding in the report is unanimous and not disputed by the prosecutor or accused, the court may determine the matter without hearing further evidence but if the finding is not unanimous, or is disputed by the prosecutor or accused, the court must determine the matter after hearing evidence.

If court finds that he is capable of understanding the proceedings, the proceedings continue in the ordinary way, but if he is found not so capable, the court must direct that the accused be detained in a psychiatric hospital or prison, pending the signification of the decision of a judge in chambers.

The DPP may stop the proceedings against juvenile accused or in a case of a minor offence.

An accused is permitted to appeal against a finding that he was capable of understanding the proceedings if he is subsequently convicted or a finding that he is incapable provided he did not himself allege this at the trial. Where the accused is declared incapable of understanding the proceedings, he may later, on becoming so capable, be indicted and tried for the offence. The so-called psychopath is generally capable of standing trial as well as being criminally liable and does not fall under the provisions of Sections 77 and 79.

If it appears reasonably possible that an accused might not fully understand the nature of the proceedings and might possibly not have been criminally liable at the time of the offence, or at least that his moral blameworthiness might have been considerably reduced due to his mental state at the time of commission of the offence, the court is obliged in terms of the s78(2) to direct an enquiry into his mental condition. *Tom and Volkman*

If the court finds that the accused committed the act in question but, by reason of mental illness or mental defect, he was not criminally liable, the court must find him not guilty and detain him pending the signification of the judge in chambers. *Makabane* In terms of s78(6) and s77(6)(b) If the court so finds after conviction but before sentencing, it must set aside the conviction, find him not guilty and direct that he be detained pending the decision of a judge in chambers. These provisions are peremptory and the court must declare the accused a state patient.

In terms of s48(5) of the CJA, the proceeding of a preliminary inquiry may be postponed for a determined period in the case where a child has been referred for a decision relating to mental illness or defect in terms of s77 or 78 of CPA.

Discuss in detail the provisions of section 105A of the CPA Act 51 of 1977 that deals with the process of plea bargaining and compare it to the traditional plea bargaining. (12)

Statutory Plea Bargaining

The scheme of s105 A is;

- An authorised prosecutor and a legally represented accused may negotiate an agreement on plea and sentence in which the judicial officer does not participate

- In court the judicial officer must question the accused on the contents of the agreement and satisfy himself that he is admitting to all the allegation of the charge
- When considering the sentence agreement the court must be satisfied it is just and if so convicts the accused with the agreed sentence.

If the court is not satisfied, it informs the parties of a more suitable sentence and the prosecutor and accused may elect to abide by this or the parties may withdraw from the agreement and the trial starts de novo.

Section 105A is in essence a codification of the traditional plea bargaining. The central innovation is that the prosecutor can now also reach an agreement with the defence on the **sentence** to be imposed. Certain mandatory formalities are prescribed, such as that the whole agreement must be in writing. The time for entering into the agreement is before the commencement of the trial, before plea. It is a once off situation and if the court has ruled for a de novo trial, the parties may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts.

Once the trial starts de novo, Section 105A dictates that the agreement is pro non scripto (as if never written) and no regard may be had to it and the parties may not plea bargain in terms of Section 105A again on the same facts. This, however, does not prevent them from traditional plea bargaining.

Traditional plea bargaining

To achieve this object a plea to a lesser is negotiated with the prosecutor, who agrees to accept. Alternatively, the accused pleads guilty on the charge but on a different basis to that alleged. In both an agreement is reached with the prosecutor on the facts which are to be placed before court to justify a conviction on the agreed basis. When more than one accused stands arraigned, an agreement could also be reached in terms of which the accused who is guilty, will plead guilty in return for the withdrawal of the charges against the other accused. An accused may also supply vital information to the investigating officer on the understanding that the accused will not be prosecuted.



Where an accused faces numerous charges, an agreement can be reached with the prosecutor that the accused pleads guilty to a specified number of charges, in return for an undertaking that the remaining charges will be withdrawn. The prosecutor and the defence cannot bind the court to a sentence. The prosecutor can, however, agree to suggest to the court a lighter sentence.

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In terms of the facts the incorrect procedure was followed because, If the court is not satisfied, it informs the parties of a more suitable sentence and the prosecutor and accused may elect to abide by this or the parties may withdraw from the agreement and the trial starts de novo. The magistrate was not justified in terms of s105A to bind the parties to a new sentence.

X stands trial in the regional court on a charge of murder in 1999. It is alleged that he killed Sweetie Scampie on 4 June 1991. X pleads autrefois acquit on the grounds that he was tried and acquitted on the same facts in 1992 on a charge of assault with intent to inflict grievous bodily harm. It seems that Sweetie Scampie died on 4 June 1991, that is on the same day and following the assault by X. It also becomes apparent that the police deceived the prosecutor in the first case by not intimating that Sweetie Scampie had died. The facts on which the assault case was based now form the basis for the murder charge as well. The regional court rejects X's plea and X asks the High Court for a special review of the case before conviction. Will the High Court countenance the plea entered by X? The state contends that the police harmed the cause of justice and therefore the review must be refused. Discuss the legal principles involved.

Every accused has a right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

The requirement for a plea Autrefois acquit are that the accused has previously been acquitted -

1. of the same offence which he is now charged;
2. by a competent court; and
3. upon its merits.

The two offences in the first and the second trial are essentially the same. In order to ascertain whether the offence is the same as that of which the accused has previously been acquitted, the court will pay attention to the true essence of the offence and not to the technicalities; it is the *ratio decidendi* of the previous judgment which is binding. It will be sufficient if the offences are substantially the same. If X has been previously

charged with assault with intent to inflict grievous bodily harm, he cannot now be charged with murder as the latter offence is competent upon a charge of the former if the victim subsequently dies as a result of the offence. In *Ndou*, the court found that where it was impossible for the state to charge the accused with the more serious offence at the first trial (the complainant was still alive at the time of the first trial, but did in fact die after the verdict of guilty or not guilty had been passed), the accused could be charged anew without his being able to invoke any of the stated pleas.

In *S v McIntyre* the accused and three others were charged with the murder of S. They raised the plea of *autrefois acquit* on the basis that they had previously been charged and acquitted on a charge of assault with intent to do grievous bodily harm, arising from the same facts. It was common cause that X had died on the night of the assault. The court held that the state could have charged the accused with murder during the first trial, and decided in favour of the accused persons.

In terms of the facts it can be inferred that X was acquitted by a competent court. The rule is that the plea of *autrefois acquit* must succeed if the offences are essentially the same (or the acts are the same). In the set of facts involved here, it was possible to allege the charge of murder in the first trial regardless of the fact that the prosecutor had been lied to, because objective justice and legal certainty require a finality of prosecutions. Therefore, the plea entered by X must succeed.

(a) X is charged in a lower court with the theft of two shirts. He pleads not guilty.

When cross examining

a state witness, X puts it to him that it was not two shirts that he (X) “bought”, but two pairs of trousers. The state closes its case and X is found not guilty. The prosecutor decides to charge X again with the theft of two pairs of trousers. Did the prosecutor follow the correct procedure and what are the chances of getting convicted on the last-mentioned new charge? Discuss. (7)

The prosecutor could have applied for an amendment of the charge - see section 86 of the Act. He/she have done so, *inter alia*, if there was a variance between the averment

in the charge and the evidence offered in proof of such averment; or where words were omitted, or unnecessarily inserted, or any other error made.

The test is whether the making of the amendment will not prejudice the accused in his/her defence.

There will be no prejudice if there is only a slight variance or where it is clear that the defence would have remained exactly the same had the state originally presented the charge in the amended form.

Section 86 makes provision for an amendment of the charge and not the replacement thereof by an altogether new charge.

It is submitted that the amendment would have been granted because the shirts/trousers as such were not placed in dispute by the accused, but the fact that he had bought and not stolen them.

It is a deep-seated principle of any civilised system of criminal law that no person shall be punished more than once for the same offence or be in jeopardy of being tried twice for the same offence. “No person shall be harassed twice for the same cause.”

Autrefois acquit

The essentials of this plea are that

- (i) the accused has previously been acquitted**
- (ii) of the same offence or substantially the same offence with which he/she is now charged**
- (iii) by a competent court and**
- (iv) upon the merits.**



X's plea will be sustained in respect of (i), (iii) and (iv) (that is quite obvious), but also in respect of (ii) because the new offence is substantially the same as the first one.

Discuss the pleas of Autrefois Convict and Autrefois Acquit (12)

Autrefois convict – the essentials are that the accused:

1. has been previously convicted of the same offence
2. by a competent court.

In order to ascertain whether the offence is the same the court will pay attention to the true essence and not to technicalities – the *ratio decidendi* of the previous judgement is binding. It is sufficient if the offences are substantially the same and not whether the nomenclatures of the respective offences coincide. The plea is also available for an offence which is a lesser one than that of which he had been convicted. The plea is not available where it was impossible at a previous trial to prefer the more serious charge presented e.g. accused convicted of assault and victim dies he can then be indicted for murder. The plea of autrefois convict can only be pleaded after the accused has already been sentenced in the first trial.

Autrefois acquit – essentials are that the accused:

1. has previously been acquitted of the same offence now charged,
2. by a competent court
3. upon its merits.

Again the plea can be relied upon when the offences are substantially the same. If an accused had been acquitted of murder and is now indicted on the same set of facts for assault he may avoid conviction with a plea of autrefois acquit because on the charge of murder he could have been convicted of assault as a lesser offence. The court must consider the essential ingredients of the conduct and apply the test used in Kerr – whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. A further policy is that trials must not be allowed to occur in a piecemeal fashion and if an accused could have been

charged with the two offences at the first trial he should not be tried in two separate trials. When considered on the merits this must have been in fact or law and the accused must not have been acquitted on a technical irregularity. Even where a court errs in law the acquittal is on the merits. With regards defective charge sheets, this affects the plea of *autrefois acquit* since the accused is in jeopardy of being convicted of a materially defective charge. A plea of *autrefois acquit* can be sustained even when it is based on the judgement of a foreign court. This plea is possible after the commencement of the trial.

Section 106 and the plea of *autrefois convict* or *acquit* – this section provides that an accused who has pleaded to a charge is entitled to demand that he be convicted or acquitted. For example if the state postpones due to lack of witnesses, the court may refuse a further postponement and latter acquit. The right of an accused to demand an acquittal in terms of S106(4) should not be denied when caused by the negligent action of the state.

When an accused pleads to a charge he may plead -

- (a) that he is **guilty** of the offence charged or of any offence of which he may be convicted on the charge; or
- (b) that he **is not guilty**; or
- (c) that he has already been **convicted**¹³ of the offence with which he is charged; or
- (d) that he has already been **acquitted**¹⁴ of the offence with which he is charged; or
- (e) that he has received a **free pardon** under Section 327(6) from the State President for the offence charged; or
- (f) that the court has **no jurisdiction** to try the offence; or
- (g) that he has been **discharged** under the provisions of Section 204¹⁵ from prosecution for the offence charged; or
- (h) that the prosecutor has **no title to prosecute**;
- (i) that the prosecution may not be resumed or instituted owing to an order by a court under Section 342A(3)(c).

Autrefois acquit



Essentially the accused had previously been acquitted -
of the same offence with which he is now charged;
by a competent court; and
upon the merits.

“on the merits” means that the court must have considered the merits of the case, whether in fact or in law, and must not have acquitted the accused because of some technical irregularity in the procedure. Where a trial proves abortive because of such irregularity, the accused may be brought to trial *de novo* and the plea of autrefois acquit cannot prevail. Even when a court errs in law in acquitting the accused, the acquittal is on the merits. It isn’t always easy to decide whether an irregularity is merely technical or not. Whether the acquittal can be said to have been “on the merits”, depends on the nature of the irregularity – Moodie and Naidoo .

Proceedings may be instituted again when a conviction of a lower court is set aside on any of the following grounds:

- (i) the court was not competent to convict;
- (ii) the charge sheet was invalid or defective; or
- (iii) there was a technical irregularity in the proceedings.

When a trial is instituted afresh on any of these grounds, a plea of autrefois acquit will be of no avail. No conviction may be reversed or altered unless it appears that a failure of justice has resulted. If the proceedings were void ab initio the court of appeal will not hesitate to intervene and set the proceedings aside.

The new trial could be on the original charge suitably amended, or upon any other charge (as if the accused had not been previously tried and convicted). The proceedings must be instituted before a different judicial officer. Where the irregularity constitutes such a gross departure from established rules of procedure that the accused hasn’t been properly tried, it is per se a failure of justice. Public policy is an important consideration here.

Once an accused has pleaded, he is to demand that he either be acquitted or found guilty. Name the exceptions to this rule. (8)



- 1) Where the magistrate has recused himself from the trial – *Punshon v Wise No*
- 2) Where separation of trials takes place
- 3) Where a trial is referred to a regional court, or is converted into a preparatory examination
- 4) Where the magistrate dies, resigns, or is dismissed
- 5) Where it appears that the accused is before the wrong court
- 6) Where the Director of Public Prosecutions makes an Application in terms of s13 that a private prosecution be stopped and that the accused be prosecuted de novo by the State
- 7) Where a youth is referred to the Children's court or where an enquiry is held in terms of the Prevention and Treatment of Drug Dependency Act 20 of 1992 (s255)
- 8) If a court finds that an accused, because of a mental disorder, is not capable of understanding the proceedings so as to make a proper defence, the court must direct that the accused be detained in a mental hospital or a prison pending the signification of the decision of the Minister
- 9) Where an accused has pleaded in terms of s119 (a plea in a Magistrate's Court on a charge justiciable in a Superior court)
- 10) Where the prosecution has been stopped by the prosecutor without the required consent of the Director of Public Prosecutions.

Discuss the plea of guilty with reference to the roles of all the various role players during the plea proceedings. (12)

Guilty



Generally when the accused pleads guilty he may be convicted and sentenced immediately. S112(1) lays down two different procedures (for serious and less serious offences) where an accused at a summary trial pleads guilty to the offence charged or to an offence where he may be convicted.

- If the presiding official is of the opinion that the offence does not merit imprisonment without the option of a fine or a fine exceeding the amount determined he may convict the accused on his plea of guilty only and impose a sentence other than that mentioned above.
- if the presiding official is of the opinion that the offence does not merit one of the sentences above then he must question the accused with reference to the facts in order to determine whether he admits to the allegations of the charge for which he has pleaded guilty.

Questioning by the presiding official in terms of s112(1) – the magistrate's questions must be directed at satisfying himself that an accused fully understands all the elements of the charge when pleading guilty and that his answers reveal that he has in fact committed the actual offence to which he is pleading guilty. The primary purpose is to protect the accused against an incorrect plea. Questions should be as few as possible and only those necessary to:

- elucidate what the accused has volunteered;
- canvass any allegation in the charge not mentioned by the accused;
- to confine the accused to the relevant detail.

S112 also applies when an accused changes his plea to one of guilty during the trial. Questioning in terms of s112 is peremptory and can operate in favour of the accused since failure to comply with the requirements will result in the conviction and sentence being set aside.

Accused version – an accused should be encouraged to tell his version and the court's function is not to evaluate answers as if weighing evidence or judge truthfulness. It is

simply to see whether they substantiate the plea. If what the accused said doesn't accord with that of the state a plea of not guilty is entered.

Prosecutors role – The prosecutor should give the court a brief summary of the State's case. If the summary reveals the offence charged, the magistrate is obliged to question the accused. This summary must be noted on the court record. The acceptance of a guilty plea is only important where the accused pleads guilty to an offence of which he can be convicted and not to the offence charged. If the prosecutor wished to proceed with the offence charged a not guilty plea is entered.

It may happen that on arraignment an accused pleads guilty to a lesser offence which is a competent verdict on the main charge – here the prosecutor can accept the plea without leave of the court.

Statement by the accused instead of questioning (s 112 (1)(b)) – the court may in lieu of questioning, convict the accused and sentence him on the strength of a written statement in which the facts are set out and he admits and on which he pleads guilty. A statement made verbally by his legal representative is not a statement intended by this section.

Evidence or questioning with regard to sentence (s112(3)) – for the purposes of an appropriate sentence, the prosecutor may present evidence on any aspect of the charge and the court may hear evidence or question the accused on any aspect of the case. This section is not intended to determine whether the accused is guilty or not.

Correction of plea of guilty – under s112 if the court is in doubt that

- (1) the accused is in law guilty or
- (2) the accused does not admit an allegation in the charge or
- (3) the accused has incorrectly admitted such allegation or
- (4) the accused has a valid defence or
- (5) the plea of guilty should not stand, the court shall enter a plea of not guilty.

Admissions already made stand as proof of the relevant facts. The court must weigh the accused's admissions and his failure to testify to decide whether all the elements of the offence have been proved. Where an accused has pleaded guilty but a plea of not guilty has been entered, the trial can be resumed before another magistrate (s118).



Committal for sentence by regional court – If the magistrate's court after conviction following a guilty plea is of the opinion :

- (1) that the offence is of such a nature or magnitude that it merits punishment in excess of the court's jurisdiction or
- (2) that previous convictions of the accused are such that the offence merits punishment in excess of the court's jurisdiction or
- (3) that the accused is a dangerous criminal, the court shall stop proceedings and commit the accused for sentencing by a regional court.

The accused is then sentenced by the regional court. If, however the regional court is satisfied that the plea of guilty was incorrectly recorded or is not satisfied that the accused is guilty of the offence or has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial.

Amendment of plea from guilty to not guilty – the accused may with leave of the court withdraw his plea of guilty. At common law this is allowed only if a reasonable explanation is provided eg fear, fraud, duress, mistake. But an application of an accused that understood the charge but had no legal representation before trial and then is represented when the trial starts to alter his plea should not be allowed. An application to change from guilty to not guilty may be brought after conviction but before sentence and the onus is on the accused to show on a balance of probabilities that the plea was not voluntarily made. In terms of s113 it is sufficient if it were alleged that the accused did not admit, or has incorrectly admitted the allegation in the charge or has a valid defence to the charge to change his plea to not guilty. Where a matter arises for which s113 does not make provision the common law provision applies and the court will reject the explanation if it is convinced beyond a reasonable doubt that it is false.

Discuss the procedure that has to be followed when a plea of guilty is entered in a murder trial in the High Court. Or "X is charged in the High Court with murder. He pleads guilty. Advise him on the procedure to be followed with regard to this plea."

Murder is a serious crime that justifies the imposition of imprisonment or any other form of detention without the option of a fine. In terms of s112 that relates to serious

offences, if the presiding judge is of the opinion that the crime justifies one of the above-mentioned penalties, or if he is requested to consider them by the prosecutor, then, in terms of section 112(1)(b), he must question the accused about the alleged facts of the case in order to make sure that he admits to the allegations in the charge with respect to which he pleaded. Only if the court is satisfied that on the grounds of the accused's answers he is guilty of the crime with respect to which he has pleaded guilty, may the court find the accused guilty of the crime without any evidence being led by the state, even if one of the above-mentioned sentences is appropriate.

The prosecutor will make this request on the grounds of the previous convictions of the accused of which the court must have no knowledge at this stage. The court must make certain that the accused is guilty by asking relevant questions. The accused or his legal representative may submit a written declaration by the accused to the court, in which the accused explains the facts to which he admits and pleads guilty. In this case, he may be found guilty without any interrogation by the court, provided that the court is convinced that he is in fact guilty. The court also has discretion to put any question to the accused in order to get clarity on any matter.

S112(1)(b) if the presiding official is of the opinion that the offence merits imprisonment without the option of a fine or a fine exceeding the amount determined or requested thereto by the prosecutor then he must question the accused with reference to the facts in order to determine whether she admits to the allegations of the charge for which she has pleaded guilty.

Questioning by the presiding official in terms of s112(1)(b) If satisfied that the accused is guilty of the offence to which she has pleaded guilty, he may convict and sentence her.

Accused version: If what the accused said doesn't accord with that of the state a plea of not guilty is entered.

Section 112 not only requires a series of admissions but also the facts upon which those admissions are based.

Prosecutor's role: The acceptance of a guilty plea is only important where the accused pleads guilty to an offence of which she can be convicted on the charge and the

prosecutor does not wish to proceed with the offence charged. If the prosecutor wished to proceed with the offence charged a not guilty plea is entered. The court may in lieu of questioning, convict and sentence the accused on the strength of a written statement in which the facts are set out and she admits and on which she pleads guilty. A statement made verbally by her legal representative is not a statement intended by this section. The accused is then sentenced by the regional court. If, however the regional court is satisfied that the plea of guilty was incorrectly recorded or is not satisfied that the accused is guilty of the offence or has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial.

Admissions made in the course of explanation of plea – the court must enquire whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission. The accused can reduce the total number of facts in issue by a plea of not guilty, which then needs to be proved by the state, by admitting facts which will then no longer be in issue. However such an admission will be sufficient proof but not conclusive proof and may later be rebutted. An accused is not obliged to consent to his admission being recorded; the onus is on the State to prove all the facts placed in issue. Admissions of facts made during an explanation of plea and formally recorded in terms of s 220 constitute sufficient proof. When an accused is asked whether an admission may be recorded he must be properly informed of the effect of such a step and that he is under no obligation to make any admission nor assist the State in proving the case against him.

Discuss and Compare the correction of a plea of ‘guilty’ to ‘not guilty’, with the application for amendment of a plea from ‘guilty’ to ‘not guilty’ (10)

Correction of plea of guilty – In terms of s113, if the court before sentence is passed and at any stage of the proceeding under s112 is in *doubt* whether:-

- (1) the accused is in law guilty or is satisfied that;
- (2) the accused does not admit an allegation in the charge or
- (3) the accused has incorrectly admitted such allegation or
- (4) the accused has a valid defence or



(5) or is of the opinion that the plea of guilty should not stand, the court shall enter a plea of not guilty and require the prosecutor to proceed. The conviction apparently lapses automatically and admissions already made stand as proof of the relevant facts. The court must weigh the accused's admissions and his failure to testify to decide whether all the elements of the offence have been proved. Doubt and not probability is sufficient to compel the court to record a plea of not guilty. Where an accused has pleaded guilty but a plea of not guilty has been entered, the trial can be resumed before another magistrate (s118). This section does not exclude or supersede the common law.

Amendment of plea from guilty to not guilty – the accused may with leave of the court withdraw his plea of guilty. At *common law* this is allowed only if a reasonable explanation is provided eg fear, fraud, duress, mistake. But an application of an accused that understood the charge but had no legal representation before trial and then is represented when the trial starts to alter his plea should not be allowed. An application to change from guilty to not guilty may be brought after conviction but before sentence and the onus is on the accused to show on a balance of probabilities that the plea was not voluntarily made. In terms of s113 it is sufficient if it were alleged that the accused did not admit, or has incorrectly admitted the allegation in the charge or has a valid defence to the charge to change his plea to not guilty. Where a matter arises for which s113 does not make provision the common law provision applies and the accused is only required to offer a reasonable explanation for having initially pleaded guilty and the court will reject the explanation if it is convinced beyond a reasonable doubt that it is false.

Not guilty

Explanation of plea – where an accused at the summary trial pleads not guilty the presiding official may ask the basis of his defence. Where the accused does not make a statement or does so but it is not clear the court may question the accused to ascertain which allegation to the charges are in dispute. However the court must inform the accused that he is not obliged to answer any questions. The court may put questions to clarify any matter but the questions should not go beyond the matters in

issue and limited to those issues in which the accused's statement is unclear. A conviction will be set aside where the court's questioning bordered on cross examination. It is important to bring attention to the accused that the statement in clarification of the plea is not evidence under oath.

Admissions made in the course of explanation of plea – the court must enquire whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission. The accused can reduce the total number of facts in issue by a plea of not guilty, which then needs to be proved by the state, by admitting facts which will then no longer be in issue. However such an admission will be sufficient proof but not conclusive proof and may later be rebutted. An accused is not obliged to consent to his admission being recorded; the onus is on the State to prove all the facts placed in issue. Admissions of facts made during an explanation of plea and formally recorded in terms of s 220 constitute sufficient proof. When an accused is asked whether an admission may be recorded he must be properly informed of the effect of such a step and that he is under no obligation to make any admission nor assist the State in proving the case against him.

Accused participation – it is irregular for a court to put questions directly to an accused who is represented and his legal representative may answer questions in terms of s 115(3). Where a legal advisor replies on behalf of the accused, the accused is to declare whether he confirms it or not. What an accused says in explanation of plea may not be used against a co-accused except when presented under oath in which event it is in fact evidence. S115 has a dual purpose – an indication to indicate the basis of his defence and questioning as to ascertain which allegations of the charge are in dispute. In respect of both the accused must be informed by the court of his right to remain silent.

Committal to regional court – when an accused pleads not guilty in a magistrate's court, the court shall subject to the provisions of s115 refer the accused for trial to a regional court. The record of proceedings in the magistrate's court will form part of the proceedings in the regional court.

Amendment of plea of not guilty – at any stage the accused may change his plea with the leave of the court. Leave is seldom refused. When an accused changes his



plea after evidence has been led, acceptance by the prosecutor at that stage does not have the same effect as acceptance of a plea before trial commencement since the court is not bound to accept the change.

The procedure in essence – the plea explanation procedure in s 115 must be approached with great caution. Its purpose is to shorten proceedings by making it unnecessary for the prosecutor to call evidence on matter not in dispute. In most cases a judicial officer will ask the accused the basis of his defence but extensive questioning of the accused will result in the setting aside of the proceedings on appeal. S 115 does not contemplate any cross examination but an objective attempt at determining the facts that are in dispute.

4. MISCELLANEOUS MATTERS CONCERNING THE TRIAL

(1) Y threatens X by saying that unless X pays a large amount of money to her (Y), she (Y) will inform X's employer that X is having an intimate relationship with her employer's husband. X reports the matter to the police. Y is arrested and charged with extortion. X is afraid that if she testifies in open court the information will come to the attention of her employer in any case. She approaches you for legal advice. Advise her on the legal position. (4)

A public trial means that, as a general rule, the public has access to and may attend it. An accused's right to a public trial is recognised in section 35(3)(c) of the Constitution. There are however certain exceptions to the general rule:

1. When it appears to be in the interests of the security of the state or good order or public morals or administration of justice
2. s153(3) CPA- At the request of the complainant where the accused is charged with committing or attempting to commit a sexual offence or extortion
3. s63(5) CJA - no person may be present in a child justice court unless it is necessary or permission has been granted by the presiding officer

In terms of s153(3) X may request that the public be excluded from the trial on the grounds that Y is charged with extortion. (explain the provisions of the section in your answer)

Open justice – who may attend the trial

The general principle is that the conduct of criminal trials takes place in open court in the presence of the accused – the accused right to a fair trial includes the right to a public trial (Constitution s 35(3)(c)).

The principle of open justice is based on two main considerations

- The notion of a fair trial of which openness is an important consideration
- Consideration of publicity – the public are entitled to be informed of the conduct of criminal proceedings and the administration of justice benefits from such publicity.

However in the case of preparatory examinations there are exceptions; in terms of s 153(1) all courts are given the power to exclude the public ;

- In the interests of the security of the state or good order, public morals or the administration of justice.
- To allow witnesses to testify behind closed doors if there is a likelihood of them being harmed as a result of testifying.
- a court may on application order that a witness or an accused give evidence by means of CCTV only if the facilities are available but the identity of the witness cannot be withheld from the defence.
- S153(3) in the case of a sexual offence or extortion, the court may exclude the public on request by the complainant but judgement must be given in open court unless in the opinion of the court the complainants identity would thereby be revealed.
- S65(3) of the CJA provides that no person may be present at any sitting of a child justice court unless such persons presence is necessary or the presiding



officer has granted permission. This section must be read together with s153(1) of the CPA

- Persons under 18 are also not entitled to attend any trial unless they are giving evidence or authorised to be present.

Once the public have been excluded in terms of s153, special circumstances must be present before this ruling is relaxed and the court must be satisfied that no harm to the witnesses and their relatives may occur as a result of such relaxation.

(2) X receives a threat that she will be killed if she testifies in a murder trial. X is summonsed to appear in court. She approaches you for legal advice. Advise her on the legal position. (7 marks)

(2) X must be informed that, according to s188, she will be guilty of an offence, arrested and brought before the court if she fails to comply with the summons. X must also be informed that if she does comply with the provisions of the summons but refuses to answer the questions put to her, she will be guilty of an offence, unless she can convince the court that she has a valid excuse not to testify, s189.

S189 empowers the court to institute a summary inquiry if a **recalcitrant witness** does not have a 'just excuse' for refusing to take the oath or after taking the oath, refusing to testify in which case such witness may be sentenced to imprisonment if the court is of the opinion that furnishing of such information is necessary for the administration of justice or the maintenance of law and order. Appeal is possible.

In *Attorney General v Kader* it was held that it is sufficient justification if a witness were to find himself in circumstances in which it would be humanly intolerable to have to testify.

A witness's fear for his safety and that of his family is not considered a 'just excuse'.

The demands of society and the interest of administration of justice require that a witness should nevertheless give evidence – *Moloto*

However, if it is not a proven necessity for the welfare of the community that the information be required specifically from the appellant, the excuse will be required just. *Cornelissen v Zeelie*



X must be informed that In terms of the Witness Protection Act, any witness who has reason to believe that his safety or that of his relatives may be or is threatened by anyone may report to the director or witness protection officer to be voluntarily placed in protection. The director may allow or refuse the application. In terms of s170A, If X is under 18 years of age, testimony through an intermediary may also be applicable.

Discuss the principles the court has to consider in an application for the postponement of a trial. (7)

(3) What are the principles that a court must take into account in considering the granting of a postponement? Discuss. (5 marks)

The two basic principles that have to be considered when postponement is granted are:

1. The interest of society in having the guilty duly convicted and not discharged due to an error that could have been avoided by an adjournment and
2. The fact that the accused is deemed innocent and has a right to a speedy trial.

(i) If necessary, a court may adjourn or postpone a case till a later date – Sections 168 and 169. The court's powers to do so are regulated by Section 170. When the court considers any application for postponement, whether it be by the State or the defence, the following basic principles have to be considered:

- It is in the interests of society that guilty men should be convicted and not discharged due to error which could have been avoided had the case been adjourned; and
- That an accused is deemed to be innocent and therefore has the right, once charged, to a speedy hearing.

A court of appeal will not interfere with a lower court's decision to adjourn a case, provided the discretion to do so was judicially exercised. If a refusal to adjourn amounts to the exclusion of relevant evidence, the conviction will be set aside. If refusal to

adjourn amounts to the exclusion of relevant evidence the conviction will be set aside – *Hatch*

Refusal of a reasonable and bona fide request for adjournment constitutes an irregularity rendering a trial unfair – *Saule*. If an accused's legal representative is absent and it isn't due to the fault of the accused, the case must be adjourned or a subsequent conviction will be set aside. If an accused fails to attend court on the date to which the case had been adjourned, he will be guilty of an offence, unless he satisfies the court that his failure to attend was not due to his fault.

In terms of s167 the court may examine any person other than the accused, who has been subpoenaed to attend or is in attendance at the proceedings and may recall and re-examine any person, including the accused already examined and the court shall examine, or recall and re-examine the person concerned if his evidence appears essential to a just determination of the case. The court is not entitled to cross-examine the witness. The purpose of the courts questions should be to elucidate obscure points or clear up ambiguities. Prosecution and defence may put questions arising from the questioning of the court and the court should, if possible only put its questions once the parties have completed their questioning. The court should not take over the prosecutor's role and an acceptable balance must be maintained between interference and detachment. The inexperience of the prosecutor and police may call for and justify a more active approach to ensure justice is done.

In terms of s186 a court may subpoena any person at any stage of the proceedings as a witness if the evidence of such witness is essential to a just determination of the case. The court may also recall an accused that has elected to testify in his own defence. The party adversely affected by evidence of a witness should be given an opportunity of rebuttal and any party desiring to cross-examine such a witness should be allowed to do so. This section is inquisitorial in nature and caters for 2 situations namely the courts discretion to call a witness and its duty to do so.



This discretion must be exercised judiciously and the court is entitled to account for the accused right to have his trial concluded within a reasonable time and may call a witness who is useful but not essential.

The court has a duty to call a witness if it is essential to the just decision of the case and it is for the court to decide whether the evidence is essential. The inexperience of the prosecutor or the accused's legal representative may create the necessity for the court to call the witness in order to ensure justice is done.

The house of Doctor X, a district surgeon, is searched in 1993 on the grounds of allegations of fraud and forgery. It is alleged that she submitted fictitious claims against the state for medicine and the treatment of patients. The story of the search and investigation of the alleged offences is published in the press. X is not charged. In 1996 she obtains a certificate from the police for emigration purposes stating that she has no previous convictions against her name. Her emigration application fails, because the allegations of fraud surface again. In August, the DPP decides to charge her. The accused requests an interdict against the state to permanently prohibit the state from instituting proceedings against her because her constitutional right to a speedy trial has been violated and she has suffered serious anxiety and depression as a result of the delay. Will X's application for an interdict be granted on the grounds that her right has been violated?

It is the right of every accused to have the trial commenced and concluded without unreasonable delay. There are three forms of prejudice which would otherwise result;

- Loss of personal liberty because of detention or restrictive bail conditions
- Impairment of personal security resulting from loss of reputation, social ostracism or loss of income from employment
- Trial related prejudice due to witnesses availability or fading memories

Furthermore unreasonable delays bring the criminal justice system into disrepute.

S342A of the CPA regulates the issue of unreasonable delays. In establishing whether

the delay is unreasonable, the court is entitled to take into account the duration, reasons, whether any person could be blamed, the effect on the personal circumstances of the accused and witnesses, the seriousness, extent and complexity of the charges, actual or potential prejudice to the state or defence, the effect of the delay on the administration of justice, the adverse effect on the interests of the public or victims or any other factor the court considers important.

The appropriate remedy for an infringement of the right to a speedy trial is to be determined in the light of the circumstances of each case and could include a permanent stay of prosecution.

The answer depends on when the trial of an accused commenced. Contact proff for answer

5. JOINDER AND SEPARATION OF TRIALS

X and Y are unemployed and have not eaten in days. Out of desperation they borrow a gun and steal a loaf of bread, milk and meat from ABC stores. The store owner notices them stuffing goods into their pockets and confronts them. X pulls out a gun and aims it at the store owner. Y panics and runs out of the store. X hits the store owner against the head with the gun and races out of the store. Both X and Y are later arrested.

(a) X and Y are jointly charged with robbery. The prosecutor approaches Y and asks him to turn state witness. Y readily agrees. Y's legal representative requests a separation of trials. Discuss whether or not a separation of trials is possible under the CPA. (8)

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X and Y are charged together with theft. X pleads guilty and Y not guilty. Y applies to the court for his trial to be separated from that of X because he wants to call X as a witness. X intimates that he does not want to testify for Y. Discuss the relevant legal principles. (8 marks)

The state decided to charge X and Y together. An application for a separation of trials will therefore almost invariably come from the defence. In considering an application for a separation of trials, the court must exercise its discretion judicially. The court has the discretion to order a separation of trials on its own account. The following points are important in respect of joinder or separation of trials:

- The basic principle on which a separation of trials can be ordered is founded on whether one or more of the accused will be prejudiced if they are tried together. The mere possibility of prejudice is not sufficient to justify an order of separation. It must be clearly evident that the joint trial will probably be prejudicial to the accused (*Nzuza*).
- The fact that evidence is led at a joint trial that is admissible against one accused, but inadmissible against another and may implicate that other (eg a confession by the former), is an important consideration in an application for a separation of trials, but not the only one. Our courts adopt the position that they can distinguish between evidence that is admissible against one accused, but inadmissible against another.
- Where the accused impute blame to each other, it will often serve the ends of justice to try them together so that the court can hear all the evidence and establish the different degrees of guilt better (*Solomon*).
- If one of two or more co-accused has pleaded guilty, it is essential to separate the trials and conclude the trials of those who have pleaded guilty first, *Pieterse*; *Zonele*. In *Somciza* it was confirmed that where one accused has pleaded guilty and the other (who has pleaded not guilty) needs the first as a witness, their trial should be separated since the first accused is not a compulsory witness in his own trial. Where both the state and the accused prefer a joint trial, however, even though some of the accused have pleaded guilty and others not guilty, failure to order a separation of trials does not amount to an irregularity (*Mikize*; *Lemmer*). In *Liscoxo* and in *Ndwandwe*, however, it was decided that the court must order a separation *mero motu* in such circumstances, regardless of any request by any

of the parties concerned particularly if the accused is not defended and is unaware of the provisions of section 157.

- It can be stated as a general rule that the right of the accused to call a co-accused as a witness does not outweigh the right of the co-accused not to incriminate himself.

6. THE PROCESS OF THE TRIAL

Briefly discuss the court's discretion to recall and question witnesses.

S167 provides the court to examine or recall any person subpoenaed if their evidence appears essential to a just decision of the case. In terms of s186 the court may at any stage subpoena any person as a witness if the witness appears essential to a decision of the case. However this power should be sparingly used since it is not up to the court to build a case which a lax prosecutor has neglected to establish. If the judge exercises his discretion improperly, this would constitute an irregularity. If the court does call a witness in terms of s167, the party adversely affected should be given the opportunity of rebuttal. The interpretation of s167 entrenches the accusatorial nature of SA criminal procedure. Note that the court may however only recall and re-examine an accused that has testified at the proceedings in terms of s167. When neither the state nor the defence has adduced evidence, it is irregular to call a witness in terms of either s167 or s186.

Identify the role and duties of the presiding officer at the conclusion of the state's case

- At this stage, the duties of the court are regulated by section 151 of the Act, note, too, that the court has a duty to call witnesses back for questioning if it is in the interest of the fair adjudication of the case see prev Q

151 Accused may address court and adduce evidence

(1) (a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on

behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and-

(i) if the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or

(ii) if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2) (a) The accused may then examine any other witness for the defence and adduce such other evidence on behalf

of the defence as may be admissible.

(b) Where any document may be received in evidence before any court upon its mere production and the

accused wishes to place such evidence before the court, he shall read out the relevant document in court

unless the prosecutor is in possession of a copy of such document or dispenses with the reading out thereof.

Discuss the discharge of the accused at the end of the states case (15)

s 174 provides that if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offences of which he may competently be convicted, it may return a verdict of not guilty. The following test as stated in *Schuping* in the pre-constitutional era came to be accepted by most high court decisions:

At the close of the state's case when discharge is considered, the first question is;

1. Is there evidence on which a reasonable man might convict, if not

2. Is there a reasonable possibility that the defence evidence might supplement the state's case?

If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence. This test was subject to constitutional scrutiny in various high court decisions taking into account constitutional rights such as the privilege against self-incrimination and the right to human dignity and personal freedom.

In *Lubaxa* the SCA took the following view:

- The accused must be discharged at the end of the state's case if a conviction would only be possible if the accused would testify and incriminate himself. The court stated that the constitutional rights to dignity and freedom call for a discharge if 'the prosecution has exhausted its evidence and a conviction is no longer possible except by self-incrimination'. The court stated that the prosecution was instituted on the basis of the common law principle that the prosecution had reasonable and probable cause to believe that the accused was guilty; and if by the end of the state's case possible self-incrimination is the only form of incrimination left, a fair trial demands a discharge. According to the court this approach will not apply in a case where there are co-accused and 'the prosecution's case against one accused might be supplemented by the evidence of a co-accused because refusal to discharge in this case is not based on an expectation of self-incrimination. It is the prospect of incrimination by a co-accused which can justify refusal to discharge. However if there is at the end of the state's case nothing whatsoever to indicate that a co-accused will incriminate an accused, refusal of a discharge would 'undoubtedly deny the accused a fair trial.

In *Masondo*: in *re Mthembu* it was noted that s174 gives the court the capacity to exercise its discretion in specific and limited circumstances to depart from the usual course, where such capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the state's case then defence does not need to present any evidence. If discharge is refused the



accused still has a choice whether to testify or close his case without being obligated to do either. If the court rules that there is no *prima facie* case against the accused there also cannot be any negative consequences as a result of the accused silence in this context.

1. It is now clear that an accused has a constitutional right to be discharged when **the evidence finally falls below the threshold of** having a 'reasonable and probable cause to believe that the accused is guilty of an offence', or, whether 'a conviction is possible except through self-incrimination by the accused. If this threshold is not met, the court then has a duty to discharge the accused.
2. In *Lubaxa* court held that In certain instances the court **has a duty to discharge** the accused *mero motu*. In our constitutional state the court has a duty to protect the accused's right to a fair trial. That the court has such a duty with regard to both defended and undefended accused when the state does not present a *prima facie* case, was confirmed in both *Legote* and *Lubaxa* (above).
3. Refusal of the court to discharge the accused upon the conclusion of the State's case is not in itself a ground for appeal or review if the accused is eventually found guilty, except where such refusal amounts to an irregularity as when the court fails to inform an unrepresented accused of his right to apply for a discharge.
4. An accused's may be discharged in respect of one or some or all of the charges against him and the director of public prosecutions (or public prosecutor) may appeal the decision.
5. Where a judge or magistrate acts with assessors, only the judge or the magistrate may decide whether to grant a discharge; since it is a question of law and a discharge cannot be considered once the defence has commenced with the presentation of its case.



If an accused is not discharged at the close of the state's case, discuss what the procedure, rules and principles are that apply in respect of the defence's (accused's) case. (8)

The defence case after the close of the state's case

- (1) The court must ask the accused or his/her representative if he/she intends leading evidence for the defence.
- (2) If the accused answers in the affirmative, he/she may address the court for the purpose of indicating to the court, without comment, what evidence he/she intends adducing on behalf of the defence.
- (3) The accused must also be informed that he/she is entitled to call witnesses or give evidence himself/herself, but also that he/she may remain silent.
- (4) If the accused answers in the affirmative, he/she shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or:
- 5) If the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself/herself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

- (6) The accused has a right to silence and not to give any evidence, but no inference may be drawn from the fact that he/she has exercised his/her right to silence. The exercise of this right has, however, certain consequences, for instance, that it leaves the prima facie evidence of the state uncontested. The accused must be informed about this.

- (7) The court must assist the unrepresented accused in presenting his/her case and in the questioning of his/her defence witnesses.

- (8) The court must be careful to refuse a request to call a witness on behalf of the unrepresented accused.

(9) The court must not be guilty of judicial harassment by descending into the arena of conflict.

(10) The accused may not make an unsworn statement.

(11) The accused may make formal admissions in respect of aspects that he/she does not dispute.

(12) The accused has the right to re-examine his/her witnesses after they have been crossexamined

by the state on any matter raised during cross-examination — see section 166.

Indicate the basic nature and content of cross-examination?

1. After examination-in-chief, Prosecution & Defence have a right to cross exam any witness in a manner that is not vexatious, abusive or discourteous, the purpose of such examination is to elicit facts favourable to the cross examiners case, cross examination, therefore is not confined to matters raised by the witness in his evidence in chief.
2. In **Manqaba**, the trial court refused cross-examination of a child witness to protect the child from possible trauma. This refusal, the high court held, amounted to an irregularity negating an accused's right to a fair trial.
3. The cross examiner has a duty to cross examine matters in dispute and misleading questions are not allowed but leading questions are.
4. If the court on good grounds shown allows for the reservation of cross-examination it cannot later deny a party the opportunity to cross examine.
5. If accused has more than one legal rep, only one can cross examine a particular state witness.



6. The failure of an undefended and ignorant accused to cross-examine ought not to have any adverse evidential consequences and where such accused experiences difficulty in cross examination, the presiding officer must assist him in formulating his questions, clarify the issues and properly put his defence to state witnesses and should protect such accused from being cross examined unfairly
7. Unfair-cross examination of an accused may result in a constitutional irregularity.
8. prosecutor can decide not to cross examine and the judicial officer cannot cross examine but may put questions to clarify aspects.
9. Co-accused have right to cross examine their co-accused or their witnesses before State has can cross examine them
10. power to refuse to recall a witness for cross examination should be exercised sparingly by presiding officer and only when it is clear that the request is made as a delay tactic.

Accused's defence rights.

The accused has a passive defence right in the sense that he can refuse to testify in his own defence and can also refuse to call any possible defence witnesses. If the accused intends adducing further evidence, he or his legal representative may address the court for the purpose of indicating to the court, without comment, what evidence will be led on behalf of the defence. The accused right to deliver a defence address is rarely exercised because the earlier cross examination of state witnesses would in most instances have disclosed the nature of the defence.

The active defence right of the accused has two basic components: His statutory and constitutional right to testify in his own defence and his constitutional and statutory right to call defence witnesses. The accused may combine his active and passive rights by refusing to be a witness in his own defence(passive) and insist on calling defence witness(active).

The accused rights to silence



An accused has the right not to be a compellable witness against himself nor can he be compelled to give self-incriminating evidence. The exercise of this right has consequences which the accused must be informed of, since it could leave prima facie evidence by the state uncontested. No adverse inference can be made against the accused merely by virtue of his exercising his right to remain silent and any finding that an accused's silence constitutes evidence of guilt will be directly in conflict with the Constitution.

Witness for the defence

An accused who wishes to testify in his own defence and wants to call one or more defence witnesses is, in principle, required to testify before calling his defence witnesses so as to prevent the accused from tailoring his testimony to fit his defence witnesses testimony, although a court may on good cause shown deviate from this sequence. All defence witnesses including the accused as a defence witness give evidence in chief by following the question and answer technique led by the party calling the witness who may not ask any leading questions regarding matters in dispute. A prosecutor may examine any defence witness including the accused called on behalf of the defence. All defence witnesses including the accused who testified in his own defence can be taken through re-examination if necessary. A witness who wishes to testify from the dock and not the witness box should be permitted to do so.

Write notes on the general rule that evidence at a criminal trial must be given viva voce. (7)

Every trial must take place in open court in the presence of the accused and the witnesses must give their evidence orally - *viva voce*. Except:-

- Evidence of certain formal matters which may be by way of affidavit subject to the right of the opposing party to object against such evidence. The prosecutor may then examine the witnesses for the prosecution and where a document is received in evidence it must be read out in court unless the accused has it or dispenses with the reading. Statements made by witnesses at a preparatory examination may not be proved even where the accused admits to the facts in the record.

- S 213 provides that a written statement by a witness will in certain circumstances will be admissible to the same extent as oral evidence given by such person. Such statements must be served on the opposing party who may object at least two days before the commencement of proceedings. The state or accused may however order the witness to give oral evidence. An accused may not make use of the section.
- Civil Aviation Offences Act which relates to 'hi-jacking' and other offences in connection with aviation. A statement in writing made on oath outside the Republic by a person whose evidence is required and who cannot be found in the Republic, may be submitted as evidence. Such statement must have been made in the presence of the accused and to a competent judicial officer

7. THE VERDICT

X assaults Y and then decides to take Y's wallet. X is charged with robbery. Discuss which verdicts could be considered to be competent verdicts in this case.

Robbery comprises the elements of assault and theft. If the state charges X with robbery but cannot prove that X assaulted Y in order to take his wallet, then robbery has not been proved and X cannot be found guilty of robbery. If the state proves that X assaulted the complainant, Y, however, and then took his wallet without his consent, then the commission of the offences ``assault" (in any form) and ``theft" has been proved.

Discuss the competent verdicts on a charge of rape or attempted rape (5)

(i) Competent verdicts on a charge of murder and attempted murder – Section 258

- Culpable homicide;
- assault with intent to do grievous bodily harm;
- common assault;
- robbery;
- public violence;



- pointing a firearm, air-gun or air-pistol;
- exposing an infant; and
- disposing of the body of a child with intent to conceal the fact of its birth.

(ii) Competent verdicts on a charge of rape or attempted rape – Section 261

- Assault with intent to do grievous bodily harm;
- indecent assault;
- common assault;
- incest;
- the statutory offence of unlawful carnal intercourse, or of committing any immoral or indecent act, or the soliciting or enticing of an immoral or indecent act with a girl under a specified age; and
- the statutory offence of unlawful carnal intercourse, or of committing any immoral or indecent act, or the soliciting or enticing of an immoral or indecent act with a female idiot or imbecile.

(b) X is convicted and found guilty of robbery. List the competent verdicts that can be given by the presiding officer on a charge of robbery. (5)

(iii) Competent verdicts on a charge of robbery – Section 260

- Assault with intent to do grievous bodily harm;
- common assault
- pointing a firearm, air-gun or air-pistol in contravention of any law;
- theft;
- receiving stolen property knowing it to have been stolen;
- possession of goods without being able to give a satisfactory account of such possession; and
- acquiring or receiving stolen property without having reasonable cause to believe that the person disposing of the property is the owner or duly authorised by the owner.

In each of the above cases, the evidence necessary to constitute the lesser offence must be



before the court, since the provisions in question are not intended to empower the court to

convict the accused without the necessary proof of his guilt on the lesser offence

Discuss the amendment of a verdict (5)

Discuss the rules applicable to the amendment of a wrong verdict by a presiding officer (5)

Amendment of verdict

1. When a wrong judgment/sentence is delivered by mistake, the court may, before or immediately after it is recorded, amend the judgment/sentence
2. Applicable only when mistake made by the court is one which is inherent in the judgment or sentence
 - Eg where court has no jurisdiction or if judgment is unrelated to merits of the case
3. Where incorrect facts are placed before court, upon which the court has imposed a proper sentence – the court may not correct such sentence as being wrong when truth is discovered
4. After reasonable time has elapsed and PO is functus officio - no longer has power to amend the mistake
5. PO should try to prevent failure of justice by reporting positioned to the High Court and requesting review by virtue of s 304(4)
6. Magistrate is not authorised mero motu to set aside a wrong conviction
7. Judicial officer is permitted to effect linguistic/minor corrections to pronounce judgment without changing Substance thereof

8. THE SENTENCE

X gets involved in an argument with her neighbour, Y. As a result of her conduct on this occasion, X is found guilty in a district court of assault with intent to inflict grievous bodily harm on Y, assault on Y's wife, cruelty to animals, wilful damage to property and theft of Y's doorbell.

(1) The magistrate decides to fine X. How would she determine the amount of the fine? (Assume that the Cruelty to Animals Act 71 of 1962 makes provision for the imposition of a maximum of thirty-six months' imprisonment.) (10)

(1) The first factor that will play a role in determining the extent of the fine is the maximum amount that the magistrate may determine. The amount of the fine for the common-law offences is limited by the normal jurisdictional limit, which is presently R60 000 for a magistrate's court. In the case of statutory crimes, the maximum amount indicated in the statute is subject to the normal jurisdictional limit, unless the imposition of a heavier fine is expressly authorised by the statute concerned. All statutory provisions must be read with Act 101 of 1991, however. This Act affects all penal provisions and couples the maximum fine with the maximum term of imprisonment that may be imposed. Currently, the ratio of R60 000 for every 3 years' imprisonment applies.

In this case the court's full jurisdiction (ie R60 000 or three years' imprisonment) is available to the court for each of the relevant offences. Since there are five charges, therefore, it is theoretically possible for the magistrate to impose a sentence of up to R300 000 or 15 years' imprisonment.

Within this statutory framework, however, a court is reliant on the judicial exercise of its sentencing discretion to determine a suitable fine in a particular case. In considering the amount of the fine, the court is usually led by the means of the accused (X). If a court imposes a fine with a view to punishing the accused outside prison, then the amount must be in proportion to the means of the accused (Ncobo). However, where the accused has little means with which to pay a fine, a very low fine that does not reflect the gravity of the offence cannot be justified. Recently our courts have emphasised this point repeatedly (Bhembe). It can be assumed that the amount of a fine imposed on a rich offender would be considerably higher, otherwise such a person would effectively remain unpunished



(More and Ntlele). The court should determine how heavily the fine should punish the offender then determine the amount that will punish the particular offender as heavily as he deserves.

Since the magistrate's decision to impose a fine will probably be motivated by a decision not to impose a prison sentence, the amount will be determined by the means available to X to pay the fine. To determine the means of the offender the court will make purposeful inquiries into the offenders income, available cash and other possessions.

(2) The magistrate is well aware that an appropriate sentence for each of these offences will lead to an excessive total sentence. How can the cumulative effect of the sentences be counteracted? (10)

(2) The best way to counteract the cumulative effect of a number of sentences is to order that the sentences or parts thereof run concurrently. Unfortunately, this can only be done in the case of prison sentences (Mngadi) and correctional supervision. The Criminal Procedure Act provides that the court may order that the prison terms run concurrently(s 280(2)), or that the terms of correctional supervision may run concurrently (s 280(3)). Otherwise the sentences are served in the sequence determined by the court, and one term begins when the preceding one has been completed.

There are two further methods of countering the cumulative effect of multiple sentences, and these are the only methods that the magistrate will be able to use in the case of X. First, each sentence may be reduced so that the total sentence is not too heavy. An objection to this is that the sentence for each individual offence may seem too light when seen in isolation.

Secondly, all the charges (or some of them) may be joined for purposes of sentencing. The Criminal Procedure Act does not make explicit provision for this possibility, but it forms part of our practice and is often used. This method has been criticised because problems may arise if some of the convictions are set aside on appeal or review, or if misdirection occurred during sentencing (cf Young). It is also inadvisable to group convictions for divergent crimes together (cf S). A court that joins different charges must



ensure that the eventual sentence is competent for each offence of which the accused is found guilty (cf Hayman).

Discuss the sentence of imprisonment for life (8)

1. Life imprisonment expressly inserted into CPA and can only be imposed by the high courts although regional courts may impose it in terms of the minimum sentence legislation.
2. Previously such a sentence was valuable alternative to death penalty
3. It is a most severe and onerous sentence, considered appropriate where the criminal should be removed from society.
4. Life imprisonment is indeterminate and the minister of correctional services may release the prisoner on parole on recommendation from the National Council of Correctional services after serving 25 years or reaching the age of 65 (if 15 years has been served).
5. Prisoners sentenced to life imprisonment before 1 October 2004 can be considered for release after 20 years.
6. This sentence is not unconstitutional due to the possibility of parole.

Add s290 from 2nd last Q in this chapter

The discretion of imposing a suitable sentence lies with the sentencing officer but he cannot do so without sufficient factual information. S274(1) allows the presentation of evidence to assist the court in determining a proper sentence. In terms of this evidence the law of evidence need not strictly be observed.

Previous Convictions

What normally happens is that after conviction the State will indicate whether the accused has any previous convictions and this is dealt with in ss271 to 273. If there are previous convictions, these are proved by handing in the fingerprint records of the accused. The court must enquire whether he admits to these – on the event of denial the prosecutor may tender evidence to prove it.

S271 A provides that certain previous convictions fall away after a period of 10 years if the offender has not committed a fairly serious crime in the interim. The convictions that fall away include;

- Less serious crimes – where more than 6 months imprisonment without the option of a fine may not be imposed
- Any offence for which the passing of sentence was postponed or for which the accused was cautioned and discharged

Further provision affecting the accused records have been introduced by the CPA Amendment act of 2008. These provisions provide for a person with previous convictions to apply in writing for the expungement thereof but some restrictions apply;

- A period of 10 years must have passed
- The application must be in writing
- The crime should not have been very serious

The concession is available regardless of the crime committed. Automatic expungement is provided for apartheid era crimes or offences based on race or offences now considered unconstitutional.

The accused on sentence

After the previous convictions have been dealt with, the accused is given the opportunity to supply information in mitigation of sentence. After the evidence by the accused has been led, the state is allowed to address the court on sentence.

The duty to supply information

It is considered a serious irregularity for the court to ask the accused whether he has previous convictions if the State does not produce this. The state should not stand by idly while the accused gives a one sided picture to court. The object of the trial is not conviction but rather a suitable sanction and the prosecutor will not fulfil the role of representative when the accused is convicted but only once everything has been done to ensure that he receives an appropriate sentence.



Various forms of correction supervision

1. The standard form can be imposed as a sentence itself like a fine or imprisonment but only with a report by a probation or correctional officer and may not exceed three years
2. It can be imposed as a condition to a suspended sentence or postponement of sentencing
3. Imprisonment may be linked to correctional supervision in terms of s 276(1) (i) where the commissioner may release a prisoner on correctional supervision
4. Where the Commissioner of Correctional services is of the opinion that a prisoner is a suitable candidate, he may apply to the court which initially imposed the imprisonment to consider correctional supervision in lieu of the remaining term of imprisonment.

The standard measures of correctional supervision include;

- a) *House arrest* – Equated to confinement at home. Exceptions allow the probationer to go to work, do shopping and to attend religious gatherings
- b) *Monitoring* – a state official will check that the probationer actually complies with the conditions of the sentence
- c) *Community service* – typical requirement of 16 hours/month of service in the interests of the community without receiving remuneration, which may consist of cleaning parks, pavements, working in hospital or other public institutions.

Discuss ordinary and life imprisonment (7)

Write brief notes on the various forms (or terms) of imprisonment. (5)

1. **Ordinary imprisonment for a term determined by court.** This is the most common form of imprisonment. All criminal courts have the power to impose a term of imprisonment for most crimes, limited only by their general jurisdiction, and or by the penalty clause for the particular crime. For common law crimes only the general jurisdiction applies – regional courts 15years, magistrates courts



3 years. High courts may impose any term. In the case of statutory crimes the general jurisdiction is applicable but always subject to the penalty clause.

2. **Imprisonment for life.** At present, this can only be imposed by the High Courts. Since the abolition of the death penalty, life imprisonment is the most severe and onerous sentence that our courts can impose. It is considered appropriate in those cases where the criminal should be removed from society. Life imprisonment is indeterminate and the court may release the prisoner on parole after considering a Correction Supervision and Parole Board report and after serving 25 years or reaching the age of 65 if 15 years has been served. This sentence is not unconstitutional due to the possibility of parole.
1. **Declaration as dangerous criminal.** Only regional and high courts may impose this sentence and only if the court is satisfied that the said person represents a danger to the physical or mental wellbeing of other persons and that the community should be protected against him. Such sentences are also indeterminate except that the court has to set a date when the offender has to reappear for re-evaluation and the duration of the initial imprisonment may not exceed the court's general jurisdiction. The Case Management Committee submits a report dealing with the conduct of the prisoner, his adaptation, training, mental state and possibility of relapse into crime to the Parole Board who then then recommends to the court on how the matter should be dealt with. When the prisoner reappears, the court considers the report along with the original sentence and any other evidence which may be adduced at the hearing then decides whether to order the continued incarceration or the release of the offender. The release may be conditional and the sentence can be converted into correctional supervision.



2. **Declaration as an habitual criminal.** Within the rather specific statutory framework of s286 of the CPA, a superior or regional court may declare an offender to be an habitual criminal if the court is satisfied that –

- a) The person habitually commits offences, and
- b) The community should be protected against him.

BOTH requirements must be met. The statutory framework furthermore removes this form of imprisonment from a courts discretion if

1. the offender is under 18 and if
2. the court is of the opinion that the offender deserves imprisonment for a period exceeding 15 years.

It is a rule that an accused is not declared a habitual criminal unless he has been previously warned that this sentence will be imposed on a further conviction although courts may impose such a sentence despite the rule. A person who has been declared as such is kept in prison for at least 7 years but not more than 15 years. After 7 years he may be considered for parole.

3. **Periodical imprisonment.** Periodical imprisonment is a form of imprisonment requiring prisoners to be imprisoned for short period only (Between 24 hours and 48 hours). After every period of incarceration they are released to continue their normal existence.
4. **Section 276 (1)(i) imprisonment** If an offender has been imprisoned in terms of s276 of the CPA, the Commissioner of Correctional services is empowered to release that prisoner, during the course of his sentence, on correctional supervision. This can happen only if the maximum sentence is for 5 years. The prisoner needs to serve at least 1/6 th of the total sentence before release.

Write notes on compensation and restitution orders (8)

Compensation

In terms of Section 300, any convicted person who has caused damage to or loss of property of another through his crime may, in certain circumstances, be ordered to compensate the victim. Such an order has the effect of a civil judgment. The amount of compensation in:

- High Courts _ Unlimited
- Regional Courts _ R 500,000
- District Courts _ R 100,000

A court may act in terms of Section 300 only when requested to do so by the injured party or the prosecutor acting on the instructions of the injured person. What follows thereafter is a separate enquire into the amount of damages, which is civil in nature. Court should explain to the parties (including the victim) what is taking place and afford them the opportunity to lead evidence and to present argument. The compensation order may be given only in respect of direct loss or damage. An order to pay compensation is inappropriate where the accused is sent to prison for a substantial period of time and he has no assets. Within 60 days of the award being made, the victim can renounce or accept the award. If he accepts, he cannot sue in the civil courts. A sentence of imprisonment in default of payment cannot be imposed.

Restitution

Section 301 provides that the court may order, at the request of a *bona fide* buyer, that he be compensated out of money taken from the convicted thief when the latter was arrested, provided the buyer returns the goods to the owner thereof.

Diversion is defined in sec 1 of the CJA as the diversion of a matter involving a child away from the formal court procedures. Succinctly put diversion means that the child does not undergo a trial but admits

responsibility and thereafter completes a diversion option. There are 3 stages at which diversion may be ordered:

A) Prosecutorial diversion

Determined under section 41 of the Act prosecutors can divert certain matters **before** the preliminary enquiry only if it involves a **schedule 1** offence and it may only be diverted to a level 1 diversion option. Diversion may occur if the prosecutor is satisfied that

1. the child acknowledges responsibility for the offence,
2. there is a *prima facie* case against the child,
3. the child has not been unduly influenced and
4. the child, parent, guardian or appropriate adult consent to the diversion.

If the child is between 10 and 14 years the prosecutor must also be satisfied that the child has criminal capacity. Diversion is not automatic for a schedule 1 offence and the prosecutor may decline diversion even if it has been recommended in a pre-trial assessment report. In terms of sec 42 the diversion decision must be made an order of court and the child and his caregiver must appear before a magistrate in chambers to certify the order.

B) Diversion by order of the presiding officer at a preliminary inquiry

Section 52(1) provides that a matter may be diverted at a preliminary enquiry if:

1. The child acknowledges responsibility for the offence,
2. The child has not been unduly influenced,
3. There is a *prima facie* case against the child,
4. The child, parents, guardian or appropriate adult has consented to the diversion and;
5. The prosecutor indicates that the matter may be diverted.

In terms of section 52(2) of the CJA a prosecutor can *recommend* the diversion of a schedule 1 or 2 offence if the views of the victim (or any other person who has interest in the affairs of the victim) are considered and where the prosecutor concerned has consulted with the police officer responsible for investigating the matter. In terms of section 52(3) the DPP who has jurisdiction over the matter may indicate that diversion is an option in a matter involving a schedule 3 offence which can only be diverted in exceptional circumstances. The DPP concerned must give a written indication including the reasons why he has decided to divert a schedule 3 offence. This is handed to the magistrate and forms part of the record and the magistrate makes the order for diversion. Note that the diversion order is **NOT** made by the prosecutor or DPP in this instance but either of these parties may recommend diversion. The presiding officer is however the party who makes or declines the order.

C) During trial in a child justice court

A matter can be diverted at any time before the conclusion of the state's case. In effect, the trial proceedings are postponed pending the child's compliance with the diversion order. This can affect the child negatively as follows: in order to be considered for diversion the child must acknowledge responsibility for his actions and if he then subsequently breaches the conditions of the diversion order his acknowledgement may be recorded as an admission (since the trial will then proceed). If the child completes the diversion programme, the court orders that proceedings are stopped. One of the distinctions between the CJA and the CPA is found in the public nature of the trial. A trial of a child is held behind closed doors and the public is excluded unless the presiding officer determines that certain persons be present as an aid to the court. Additionally the identity of the child may not be published. Section 65 of the CJA determines that a child must be assisted by a parent, guardian or appropriate adult in the child justice court (please note that assistance is not akin to legal representation. A child appearing in a child justice court who cannot afford the service of a private practitioner will have representation from the Legal Aid Board South Africa appointed to him).



In terms of section 57, when making a diversion order, the magistrate (who in chambers makes the diversion an order of the court), inquiry magistrate or child justice court must designate a probation officer or other suitable person to monitor the child's compliance with the diversion order. If a child fails to comply with the diversion order, the probation officer or other suitable person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure. If the child successfully completes the diversion, the probation officer or other suitable person must submit a report to the prosecutor who deals with the matter.

Diversion is split into two levels:

- i) Level 1 – applies to schedule 1 offences and may not, if a time period is applicable, exceed 12 months in the case of a child under 14 or 24 months for a child over 14 year of age. This level presents diversion option ranging from the mild (such as writing a letter of apology to the victim) to the formal (such as attendance of a programme, restitution, compensation service to the victim).

- ii) Level 2 – applies to schedule 2 and 3 offences and may not, if a time period is applicable, exceed 24 months in the case of a child under 14 or 48 months for children older than 14. Level two diversion options are seen as more serious in nature. The options for level 1 offence are still available but are then supplemented with more serious consequences (such as placement in a vocational programme, intensive therapy and restriction of movement under the supervision of a probation officer).

In terms of the CJA imprisonment is used only as a measure of last resort and only for the shortest appropriate period of time. Diversion from the criminal process is a central feature of the new system. This means the child offender is not prosecuted in the criminal court but subject to any number of conditions of diversion aimed at restorative justice and other community based measures. Sentencing takes place only when the prosecution determines that a criminal trial is required for some appropriate reason and the trial and sentencing take place in a child justice court which:



- (a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and
- (b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.

An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence:

- (a) under the age of 16 years; or
- (b) 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended, he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court

Children convicted in terms of the CJA have their sentences automatically reviewable provided they fall into one of the following categories:

Where the convicted child was at the time of the commission of the offence –

1. Below the age of 16 years; or
2. At least 16 years of age but below the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended or any sentence of compulsory residence in a child and youth care centre.

Section 290 of the CPA makes provisions for different methods of dealing with juvenile offender and, in the case of someone below the age of 21, the court may order that:

- he is placed under the supervision of a probation / correctional officer; or
- he be sent to a reformatory.

If he is younger than 18, he may also be placed in the custody of another suitable person. In addition, fines can also be imposed. No other combination of sentences is possible. Being sent to a reformatory or reform school is a severe punishment, which resembles imprisonment, and shouldn't be imposed without first obtaining a probation report on the offender and, generally, also not if the offender is a first offender. A court may order that the person, who is sent to a reform school in terms of this Section, be detained in a place of safety until the order can be put into effect.

New developments

Child offender: Subjected to a number of conditions of diversion

Aim: Emphasising restorative justice and other community based measures.

Effect: Child offender will not have a criminal record.

Sentencing: Takes place in a Child Justice Court when the prosecution that a criminal trial is required for some appropriate reasons

Discuss and compare the applicability of minimum sentence legislation between the CJA and CPA with reference to both legislation and decided cases. (8)

Section 51 of the Criminal Law Amendment Act provides for the imposition of minimum sentences for a wide range of the more serious crimes, e.g. for premeditated murder and rape where aggravating factors are involved, life imprisonment is prescribed.

Specific minimum terms are prescribed for a wide range of other crimes, especially when committed by gangs or crime syndicates or law enforcement officers. Only High Courts and Regional Courts may impose these sentences. The sentencing courts are also not allowed to suspend any portion of the minimum sentence. If the sentencing court is satisfied that there are "substantial and compelling circumstances" justifying a lesser sentence than that prescribed, it may impose such lesser sentence. In the case of *Malgas*, the court decided that "substantial and compelling circumstances" should be interpreted to have the following effect: the sentencing court should consider the sentences prescribed in the CLA as a point of departure, which should normally be imposed and not be departed from lightly. If the cumulative effect of all the mitigating factors justifies a departure the court should consider doing so. Also, if the imposition of



the prescribed sentence would amount to an injustice, the court should intervene and impose a lesser, appropriate sentence.

The prescribed minimum sentences are not applicable to an offender of less than 18 years when the offence was committed. Minimum sentence legislation will remain in force until expressly scrapped.

In *Dodo* the court held that, as the courts are allowed to deviate from the prescribed sentences in the presence of substantial and compelling circumstances, it prevents the punishment being disproportional to an offence and, therefore, Section 51 is not unconstitutional.

9. REVIEW

(b) X is charged in a lower court with robbery with aggravating circumstances (so-called “armed robbery”). He is convicted by the magistrate who has held the substantive rank of magistrate for ten years and is sentenced as follows: a fine of sixty thousand rand (R60 000) or fourteen months’ (14) imprisonment, plus a further two years’ imprisonment suspended for five years on condition that he behaves himself properly during the period of suspension. Discuss the *regularity or otherwise* of this sentence and explain the *post-trial procedure* relevant to this matter. (7)

(1) The jurisdiction of the court in respect of

- (a) the offence committed and
- (b) the sentence

The correctness of the sentence

The automatic reviewability of the sentence (there is a difference between the courts’ ordinary jurisdiction and reviewable jurisdiction in terms of s 302 of the Criminal Procedure Act)

(2)(a) Jurisdiction in respect of offences



In order to impose a valid sentence a court must have jurisdiction to try the relevant offence.

A magistrate's court may try all cases except murder, treason and rape, therefore, in principle this court may try "armed robbery".

- (i) A regional court may try all cases except treason. Hence it is therefore also competent to try "armed robbery".

(b) Jurisdiction in respect of punishment

(i) A district court may sentence (an accused) **to a fine of R60 000 and/or three years' imprisonment per charge.**

(ii) A regional court may sentence someone to **a fine of R300 000 and/or 15 years' imprisonment per charge.**

(iii) The jurisdiction in respect of punishment may expressly be increased by law, but it is not relevant in this question. **Hence the fine of R60 000 is regular in both courts.**

(iv) The alternative imprisonment of 14 months is added to the suspended imprisonment of two years. It is therefore three years and two months. Hence the sentence is regular in the regional court, but irregular in the district court, because the latter's jurisdiction is exceeded by two months.

(3) The suspended sentence

- a) A sentence may, at the discretion of the court, be suspended for a maximum period of five years, as in this case.
- b) The conditions must be relevant to the offence and reasonable. They must also be stated clearly and unambiguously, which is not the case here.

(4) Automatic reviewability

(a) Only certain sentences of district courts are subject to automatic review, while sentences of regional courts are not, except in cases of *contempt in facie curiae*.

(b) The following sentences are subject to automatic review:

(i) Sentences of imprisonment for a period exceeding three months or a fine exceeding R3000 if imposed by a judicial

officer who has not held the substantive rank of magistrate or higher for seven years

(ii) Sentences of imprisonment for a period exceeding six months or a fine exceeding R6000 if imposed by a judicial

officer who has held the substantive rank of magistrate or higher for seven years or longer

(iii) In both the above instances automatic review takes place only if the accused was not assisted by a legal adviser during the trial and at the time of sentence

This sentence is therefore subject to automatic review if imposed by a district court.

Imprisonment for Juvenile offenders

Offenders under 14 at the time of sentencing cannot be imprisoned except in terms of minimum sentence legislation and in some cases a child may only be imprisoned if he has a criminal record and if there is substantial and compelling evidence for a sentence of imprisonment. A child may not be imprisoned for more than 25 years. In addition ss 77 and 69(4) contains guidelines to be followed in determining whether imprisonment should be imposed – the court must look at the seriousness of the crime, protection of society and the impact on the victim.

1. Compulsory residence in a care centre – s76 allows for imprisonment to follow compulsory residence in a care centre and such residence is limited to 5 years or when the child reaches 21.
2. The child may also be sentenced to correctional supervision
3. Fines – s74(1) allows this but only after investigation as to whether it is possible to pay the fine.
4. Restorative justice – s73 provides for specific measures for restorative justice such as family group conferences, victim = offender mediation



5. Community based services – any of the diversion options provided in the act could be included with such a sentence
6. Suspension of sentence and postponement of sentencing – this also applies in the case of child offenders

X is convicted of theft in a lower court and sentenced by magistrate P to a fine of R8000 alternatively 2 years imprisonment plus a further 15 months imprisonment suspended for 5 years on condition that X will not steal again in the period of suspension. P was previously a judicial officer for 5 years after which he left the judiciary for a period of 4 years. Since 2001 he has been in full time employment as a judicial officer. Discuss and give reasons whether the sentence imposed upon X is automatically reviewable and explain also whether you consider the sentence to be competent and appropriate. (7)

An unrepresented accused, X, is found guilty of an offence in a lower court. The presiding judicial officer, who has held the rank of magistrate for 10 years, sentences X as follows: A fine of R2 500, or imprisonment for 12 months, plus a further period of three years, suspended as a whole for three years on condition that the accused behaves well. Comment on the sentence and the relevant legal principles. (10 marks)

The first point to be considered is whether the magistrate had penal jurisdiction to impose the sentence (ie in which court did the proceedings take place?). The facts of the case refer to a lower court, which includes both regional and district courts.

Jurisdiction in respect of punishment

(i) A district court may sentence (an accused) **to a fine of R60 000 and/or three years' imprisonment per charge.**

(ii) A regional court may sentence someone to **a fine of R300 000 and/or 15 years' imprisonment per charge.**



The jurisdiction in respect of punishment may expressly be increased by law, but it is not relevant in this question. **Hence the fine of R2 500 is regular in both courts.**

Regarding the term of imprisonment, the sentence runs over a period of four years (direct and indirect prison sentences are added), which is outside the jurisdiction of the district court and therefore such a court was not authorised to impose the sentence.

The suspended sentence

- (a) A sentence may, at the discretion of the court, be suspended for a maximum period of five years.
- (b) The conditions must be relevant to the offence and reasonable and must also be stated clearly and unambiguously, which is not the case here.

The fine and the prison sentence should be in proportion to each other. Since the magistrate's decision to impose a fine will probably be motivated by a decision not to impose a prison sentence, the amount will be determined by the means available to X to pay the fine. To determine the means of the offender the court will make purposeful inquiries into the offenders income, available cash and other possessions.

If the case was concluded in the district court the accused may, under section 19, read with section 24 of the Supreme Court Act, submit it for review on the grounds of the court's lack of jurisdiction and the irregular suspensive condition. The case is also automatically reviewable because the prison sentence on this charge exceeds the term as provided in section 302 (1)(a)(1). In itself, the fine does not exceed the amount stated in section 302(1)(a)(ii) so it does not qualify automatically for review. However, the sentence is reviewable because one of its components is automatically reviewable. If the case was tried in a regional court the accused may submit it for review on the grounds indicated above, but the case is not automatically reviewable. The accused or the prosecution may approach the High Court to take the matter on review in terms of the provisions of section 304(4), or according to the motion procedures provided by the



rules of the Supreme Court Act. The first method is cheaper than the procedure followed under the Supreme Court Act.



(a) Who has *locus standi* in respect of constitutional matters? Discuss. (4)

Section 38 of the Constitution provides that when an infringement of or a threat to any right in the BOR is alleged, any person mentioned below will be entitled to apply to a competent court for appropriate relief, which may include a declaration of rights. The courts may be approached for relief by any of the following persons:

- 1) A person acting in his/her own interest.
- 2) An association acting in the interests of its members
- 3) A person acting on behalf of another person who is not in a position to seek such relief in his/her own name
- 4) A person acting as a member of, or in the interests of, a group or class of persons.
- 5) A person acting in the public interest.
- 6) An amicus curiae ie. Any person interested in any matter before the constitutional court.
- 7) Any person or organ of state with sufficient interest

Ways of access to the Constitutional Court:

1. Direct access by any member of the public shall be allowed in exceptional circumstances only and must be in the interests of justice.
2. Direct access is permitted in the following instances:
 - a) In the case of a referral of a bill of parliament or of the provincial legislature by the President or Premier of a province

- b) When the constitutionality of an act of parliament or provincial legislature is challenged by members of the national assembly or provincial legislature
 - c) When the certification or amendment by the constitutional court of a provincial constitution is requested.
- 3. An order of constitutional invalidity by a court is directed directly to the constitutional court for confirmation and a person or state organ who wishes to appeal against such an order or to have it confirmed by the constitutional court
 - 4. By means of an appeal against a decision of any court on a constitutional matter with the leave of the constitutional court.

(b) Name the forms of remedies or legal aid that a competent court may grant in constitutional matters. (3)

- 1. Constitutional invalidity of a law
- 2. The suspension of such order for a period to allow for the rectification of the constitutional defect in the law
- 3. To adjourn the constitutional proceedings pending a decision of the constitutional court
- 4. The exclusion of unconstitutionally obtained evidence
- 5. A temporary interdict
- 6. Declaration of rights
- 7. Or other temporary relief

What is the meaning of a “declaratory order” when it is requested? (7)

Legal rights or obligations can be decided by means of a declaratory order. Section 19 of the SCA provides that the Supreme Court has the power, in its discretion and

at the instance of any interested party, to inquire into and decide any existing, future or contingent right or obligation, despite the fact that such people cannot claim relief consequential upon the determination. Such interested party can be the accused or the prosecuting authority. A declaratory order is a discretionary remedy and can be granted although there is no existing dispute, but the dispute must still be alive. The courts won't deal with or pronounce upon abstract, hypothetical or academic points of law in proceedings for a declaratory order. The applicant must show that he has a tangible, real and justifiable interest in the determination of his rights and obligations. Where an appeal or review might not cover the rights or obligations in question on which clarity is required, a declaratory order may be requested. Declaratory orders are not designed for use when the constitutional invalidity of a statutory provision is being considered.

- both are aimed at setting aside a conviction or sentence.
- correct procedure must be used
- appeal is correct way to challenge conviction or sentence or both
- appeal is concerned with the substantive correctness of the decision based on the facts or merits of the case on the record and the law relevant to such facts

- if a party feels aggrieved about an irregularity involved in arriving at the conviction, best procedure to use is review
- review concerns validity of proceedings
 - an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result but to the methods of a trial for eg. High handedness or mistaken action which prevented aggrieved party from having his case fully and fairly determined
 - not only irregularities that arise from high handedness but also bona fide mistakes denying the accused a fair trial will amount to irregularity
- if party wants to attack proceedings on one or more grounds of review and also correctness of magistrates' findings on the facts of law or both, he may appeal and apply for review
- judicial review relating to constitutional issues are brought by means of appeal or review depending in which forum (LC or HC) the constitutional matter arises

- purpose/aim of review will cause approach to and grounds of review or appeal to be different.

- differences betw appeal & review procedure when const issues are not exclusively involved are the following iro the court of appeal or review

Following sentences are subject to automatic review:

1. Sentences of imprisonment (incl compulsory residence in a child and youth care centre) for a period exceeding 3 months if imposed by judicial officer who has not held rank of magistrate or higher for seven years or which exceeds a period of 6 months if imposed by judicial officer who has held rank of magistrate or higher for seven years or longer- are subject to automatic review. Direct imprisonment & any suspended imprisonment if imposed must be added to determine reviewability of sentence. A suspended period of imprisonment is subject to automatic review if it exceeds the prescribed period. If suspended sentence of imprisonment does not exceed prescribed limit, it is not subject to automatic review
2. A sentence of a fine that exceeds the amount determined by Minister by notice in gazette for respective judicial officers is subject to automatic review. From 14 Feb 2003, a sentence that in the case of a fine exceeds R3000 if imposed by judicial officer who has not held magistrates rank or higher for seven years or if the fine exceeds R6000 and is imposed by judicial officer who has held magistrates rank or higher for seven years or longer, is subject to automatic review
 1. For purpose of automatic review, its irrelevant if fine is coupled with alternative sentence of imprisonment whether suspended or not or whether fine is paid or not
 2. all sentences of fines above prescribed limit imposed by magistrate of district courts render proceedings automatically reviewable and its irrelevant whether fine is paid or not



3. to work out sentences that are appropriate for automatic review, each sentence must be considered a separate one. The fact that the majority of the sentences imposed iro more than one count in the same proceedings or criminal trial exceeds the prescribed periods or amounts, does not render those sentences if below the statutory prescribed limits subject to automatic review.
4. automatic review is performed by either court of review of appropriate provincial or local division of HC or in chambers by a judge
5. it does not affect an accused right of appeal against a sentence whether before or after confirmation by a judge/court reviewing it
6. if accused appealed against conviction/sentence and has not abandoned appeal, automatic review of a sentence is suspended and will cease to apply concerning such accused when judgment is given

Name the grounds for review as set out in s24 of SCAct upon which the proceedings of a lower court may be brought in review before a court of review.

(4)

- ito s24(1) SCA, the grounds upon which proceedings in any LC may be brought under review before prov/local div of HC with jurisdiction are:

1. absence of jurisdiction on part of court eg where offence is one that cannot be tried by court or where the court imposed a punishment beyond its jurisdiction or where offence was committed outside courts territorial area of jurisdiction or where the sentence imposed by the court although competent proved to be unworkable
2. interest in the cause, bias, malice or the commission of an offence referred to in Preventions & Combatting of Corrupt Activities Act 2004 on the part of the presiding judicial officer. This ground deals with irregularities which are founded on a lack of good faith, ulterior motive or corruption on part of magistrate
3. gross irregularity in proceedings



4. admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence

Discuss the functions and powers of the court of review (8)

- Upon automatic review, the function of the court is solely to decide whether the proceedings were in accord with demands of justice
- evidence is not considered as carefully as upon appeal & the same weight is not attached to technical points
- this is equally applicable to all kinds of review since a review is concerned only with question whether the proceedings are in accordance with demands of justice
- interests of convicted person & those of State are considered
- question whether the proceedings were according to justice must be decided according to circumstances which prevailed when the proceedings took place
- it is only in exceptional circumstances that the court will take knowledge of circumstances that occurred after completion of proceedings and alter the sentence on this account
- a decision is right or wrong according to the facts in existence at time it is given, not according to new circumstances subsequently coming into existence
- functions & powers of a court on review as set out hereunder are applicable irrespective of the type or manner of review which is brought before the review court
- the absence of specific provisions in SCA regarding that courts powers & functions suggests that the provisions of s304(2)(b)(c) apply equally to reviews brought under SCA

10. APPEAL

X is tried in the High Court on a charge of robbery arising from the fact that X attacked Y and forced her to hand over the keys to her shop two kilometres away. X tied Y to a pole and went to the shop where he stole money and other property. During the trial, X is subjected to lengthy cross-examination by the presiding officer. The court finds X not guilty of robbery, but guilty of theft because the



money and goods were not stolen in the presence of Y. The accused is dissatisfied with the conduct of the proceedings and the state disagrees with the verdict of the court. Discuss the criminal-procedure remedies of appeal for both parties. (10)

The accused in the case in question can apply to the trial court within 14 days of being found guilty for a special entry in the record on the grounds that the court acted irregularly by cross-examining him which is not the task of a court. The trial judge will have to consider the application based on the alleged irregularity and 2 types of irregularity are possible:

1. those relating to the trial, for example, where an assessor gains extra-curial information that could be detrimental to the accused; and
2. those that arise during the trial, for example, the refusal of a judge to allow proper cross-examination.

If the irregularity is apparent *ex facie* from the record, and a general and unqualified leave to appeal has been granted then the accused can apply for leave in terms of section 316 to appeal against his conviction and/or sentence (*Ncaphayi*). If the application for a special entry is refused, the accused may petition the President of the Supreme Court of Appeal within 21 days of refusal for a special entry to be made on the record. The accused's conviction and sentence are not to be set aside by reason of the irregularity, unless it appears that a failure of justice has in fact resulted from the irregularity

According to section 319, the state may request the reservation of a point of law in order to obtain a decision on whether a requirement for the offence of robbery is that goods must be taken from the complainant in her presence – In *Seekoei*, the court did not decide the issue whether an acquittal on the main charge and a conviction on an alternative charge could be considered as a complete acquittal. It is suggested that as



the accused is not set free it does not amount to an acquittal. a question of law can be reserved where the accused is found guilty on a competent verdict.

The requirements for reserving a question of law are:

- (i) only a question of law may be reserved;*
- (ii) the question of law must arise 'on trial' in a High Court, meaning that the legal point must be apparent from the record;*
- (iii) the question must be raised by the court of its own motion or at the request of the prosecutor or the accused;*
- (iv) the judge must accurately express the legal point he had in mind;*
- (v) a request for reservation must be made after the conclusion of the trial;*
- (vi) there must have been an actual trial.*

If the court refuses to reserve a question of law at the request of the accused or the state, they may by petition to the President submit an application to the Supreme Court of Appeal. A question of law can only be reserved by the prosecutor in the following instances:

- (i) where there has been an acquittal;*
- (ii) a court's quashing of an indictment allows the State a right of appeal pursuant to its duty to prosecute;*
- (iii) where there has been a conviction and the question of law may be to the advantage of the accused;*
- (iv) where the question may have a bearing on the validity of the sentence imposed.*

If an application for a special entry is finally refused by the Supreme Court of Appeal, reservation of a point of law may still be requested (R v Nzimande).

If any one of the parties fails to apply for the above appeals in good time, then condonation may be requested.



X is found guilty of rape in a High Court and is sentenced to 25 years' imprisonment. X wants to appeal against the sentence and applies to the trial court for leave to appeal. X's application is refused. In the meantime, evidence emerges that indicates that X could not have committed the crime. X consults you. Advise X on the procedure and the procedural remedies at X's disposal.

In terms of Section 316(5)(a), when applying for leave to appeal, the accused may also apply for leave to lead further evidence. If an accused(X) discovers further evidence after the trial court has already refused an application for leave to appeal, the remedy in terms of s316(5) is exhausted. If leave to appeal was granted but leave to lead further evidence refused, an accused may approach the Supreme Court of Appeal in terms s316(8), which may grant leave to lead further evidence. If however, the SCA refuses the petition in terms s316(8), the SCA cannot act in terms of s22 of the SCA Act.

An application for the hearing of further evidence in terms of s22 of Supreme Court Act and section 316(5) of CPA differs in the following aspects:

Section 316 - leave to lead further evidence may be applied for only in combination with an application for leave to appeal only.

Section 22 does not demand simultaneous application and SCA may be approached in circumstances where leave to appeal has already been granted before the further evidence came to light - but appeal must have been granted or petitioned to be before SCA in order for them to hear further evidence - SCA has no power to order further evidence to be heard if leave to appeal has already been refused with final effect by SCA.

However the dictates of fairness require that all relevant information bearing on the applicant's guilt or innocence should be before the trial court to enable it to determine the true facts, to prevent an injustice either to the applicants or the state - Ndweni

Then the only remedy available to the accused(X) will be in terms of s327 of CPA which provides that if a person convicted of any offence in any court has exhausted all the recognised legal procedures regarding appeal and review or if they are no longer available to him, such person may submit a petition supported by affidavits to minister of



Justice stating that further evidence has become available which materially affects his conviction or sentence. The Minister may, if he considers that such evidence, if true might reasonably affect the conviction refer the petition and affidavits to the court which convicted the accused.

Court receives the affidavits and may permit the examination of witnesses in connection with the further evidence as if it were a normal criminal trial (accused presence not essential) and assess the value of the evidence. Courts findings regarding further evidence do not form part of the proceedings. Court finally advises the President whether and to what extent the further evidence affects the conviction. President considers the finding or advice and may then:

- Direct that the conviction be expunged effectively giving the accused a free pardon or
- Commute the conviction to a lesser one and adjust the sentence accordingly



Appeal on special entry of irregularity or illegality

Proceedings that are *irregular* or *not according to law* in a lower court may be taken on review before the High Court. However, there is no review procedure for irregular proceedings in trials in a High Court, but the CPA makes provision for a special entry where the accused may, if convicted, take his case to the Supreme Court of Appeal. This procedure is necessary because an irregularity will often not appear from the record and thus the accused cannot rely on it if he takes it on appeal. With a special entry, the accused may request during or after the trial, that the irregularity be entered on the record. The trial judge will have to consider the application based on the alleged irregularity and 2 types of irregularity are possible:

- (i) Those *relating* to the trial, for example, where an assessor gains extra-curial information that could be detrimental to the accused; and



(ii) Those that arise *during* the trial, for example, the refusal of a judge to allow proper cross-examination.

If the irregularity appears clearly from the record, it is unnecessary for a special entry to be made. Section 317(1) provides that if an accused thinks that the proceedings in the High Court are irregular, he may, during the trial or within 14 days after the conviction, apply for a special entry to be made on the record, stating in what respect the proceedings are alleged to be irregular or unlawful. The court is bound to make the entry, unless the judge is of the opinion that the application is frivolous or absurd or not made *bona fide* or the granting of the application will be an abuse of the process of the court. Special entries only deal with procedural irregularities and not questions of law. If a special entry is made on the record and the accused is convicted, he may appeal to the Supreme Court of Appeal against conviction on the ground of the irregularity, within 21 days after the entry was made. If the application for a special entry is refused, the accused may petition the President of the Supreme Court of Appeal within 21 days of refusal for a special entry to be made on the record. The accused's conviction and sentence are not to be set aside by reason of the irregularity, unless it appears that a failure of justice has in fact resulted from the irregularity. The question then is whether the irregularity is of the kind that *per se* vitiates the proceedings – **Moodie**, or which requires that on the evidence and credibility findings, unaffected by the irregularity there was proof of the accused's guilt beyond a reasonable doubt – **Naidoo**

Name the facts or circumstances that have to be alleged in an affidavit when an application is brought on appeal to lead further evidence. (3)

On the hearing of an appeal the SCA has the power to remit the case for the hearing of further evidence or to hear further evidence itself. There should be a possibility amounting to a probability that a miscarriage of justice will take place unless the additional evidence is led.

Requirements:

1. Reasonably sufficient explanation why evidence was not lead at trial - SCA has power to relax strict compliance with this one.

2. Prima facie likelihood of truth of evidence

3. Evidence must be materially relevant to outcome of trial

- An application for the hearing of further evidence in terms of s22 of Supreme Court Act and section 316(5) of CPA differs in the following aspects:

Section 316 - leave to lead further evidence may be applied for only in combination with an application for leave to appeal only.

Section 22 does not demand simultaneous application and SCA may be approached in circumstances where leave to appeal has already been granted before the further evidence came to light - but appeal must have been granted or petitioned to be before SCA in order for them to hear further evidence - SCA has no power to order further evidence to be heard if leave to appeal has already been refused with final effect by SCA.

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Write notes on the reservation of questions of law as provided for in section 319 of the Criminal Procedure Act. (6)

It is possible that in the course of a trial in the High court a question of law relative to that case may arise. The court itself may be uncertain about the law regarding a certain point, for example whether specific evidence is admissible, or whether certain actions constitute a crime.

If a question of law arises during a trial in a High Court, the court may, at its own motion, reserve that question for the consideration of the SCA. The court then states that the question is reserved, the following requirements for reserving a question of law were emphasised in *Director of Public Prosecutions, Natal v Magidela*:

1) Only a question of law may be reserved.

2) The question of law must according to s319 'arise' on trial in a superior court.

- 3) The question must be raised by the court at its own motion or at the request of the prosecutor or the accused in which event the court should 'state the question reserved' and direct that it be entered into the record.
- 4) The judge must accurately express the legal point he or she had in mind especially if the questions of law are reserved on the motion of the judge.
- 5) A request for the reservation of a question of law must be made after the conclusion of the trial.
- 6) There must have been an actual trial.

In Haarmeyer it was held that the application should be made as soon as possible after judgment or within a reasonable time. Where the accused was convicted, a question of law may not be reserved that could have an adverse effect upon the accused iro such conviction. A question of law can therefore only be reserved on the application of the prosecutor in the following circumstances:

- 1) Where there has been an acquittal.
- 2) A courts quashing of an indictment allows the state right of appeal pursuant to its duty to prosecute. *Basson 2007*
- 3) Where there has been a conviction and the question of law may be to the advantage of the accused *Solomons 1959*
- 4) Where the question of law may have bearing upon the validity of the sentence imposed.

The primary benefit of reserving a question of law is that it provides the state with the same opportunity to appeal on a point of law as it has when it appeals a decision of a lower court on a point of law. This section is of little use to the accused as he may raise the same points in an ordinary appeal.



Discuss the application for leave to appeal against a decision or order by a High Court with reference

to when, by whom and against what such an application may be made. (7)

Who may apply for leave to appeal?

- 1) Any accused other than those juvenile offenders convicted before a High court on any offence may, within 14 days of the passing of the sentence or order as a result of such conviction, apply for leave to appeal against such conviction.
- 2) Leave to appeal against a judgment or order given on appeal by a court of a provincial or local division, must be applied for by the appellant within 15 days after the date the judgment was given
- 3) An accused who is found guilty by reason of mental disorder at the time when he committed the act may appeal against such a finding if the finding was not made in consequence of an allegation by the accused that he was mentally disordered.
- 4) Leave to appeal before termination of the trial is not allowed.
- 5) The DPP may within a period of 14 days of the passing of the decision, apply for leave to appeal against the decision of a High Court to release an accused on bail. The DPP may not appeal the imposition of any condition of bail.

Appeals to the SCA or Full Courts are not as of right but allowed only if leave to appeal has been granted by the high court or in a case of a refusal, with leave granted on a petition to the SCA. However an absolute right of appeal is available to certain young offenders convicted of any offence by a High Court and was at the time of the commission of the offence:

- (i) below the age of 14 years; or
- (ii) at least 14 but below 16 years and was not assisted by a legal representative at the time of conviction; and
- (iii) was sentenced to any form of imprisonment, as contemplated in section 276(1) that was not wholly suspended,



In certain exceptional circumstance persons are barred from access to appeal to HC with respect to certain matters, eg the case of the fugitive convict. These exceptions are applicable to all courts xcept in the case of certain juveniles of specific age groups, but allowed only if leave to appeal has been granted by the high court or in a case of a refusal as in the question, the appellant has recourse to the Supreme Court of Appeal by means of petition submitted to the president of that court or to refer the hearing of the appeal to the Full Court. The main consideration is whether the applicant has a reasonable prospect of success on appeal. If the accused abandons his appeal, the sentence will nevertheless be reviewed. Once judgment has been given on appeal, no automatic review can take place. A judge can withdraw his certificate if he discovers afterwards that he made a mistake or if admissible fresh evidence is discovered after the proceedings have been confirmed.

(ii) In terms of Section 304(4) of the CPA, if it is brought to the attention of the provincial or local division, or to a judge thereof that criminal proceedings were not in accordance with justice, the judge has the same powers as laid down for automatic review. These provisions apply where the criminal proceedings are not subject to automatic review. The provisions of this subsection enable the DPP, the Magistrate or the accused to bring irregularities in the proceedings under review by bringing it to the notice of a judge in chambers. However, a matter that has been finally disposed of on appeal may not be brought on review in terms of Section 304(4). The question that the court must consider is whether there are considerations of equity and fair

dealing that compel the court to intervene to prevent a failure of justice. No time limit is set by

Section 304(4) and cases have been reviewed even after a lapse of 4 years since conviction -

Fouché. In McIntyre this procedure was used by the accused to enforce the review of the

court's decision on a special plea before any evidence was led by the state.

Name the instances when the prosecution may appeal decisions given by the high court. (5)

Appeal against decisions by a High Court on bail

Director of Public Prosecutions may appeal to the Supreme Court of Appeal against the decision of a High Court to release the accused on bail, but he may not appeal against the imposition of certain bail conditions. He has to apply for leave to appeal in terms of Section 316.

Appeal limited to questions of law

The prosecution may, like an accused apply for the reservation of a question of law for decision by the Supreme Court of Appeal.

Appeal against a sentence of a High Court

The DPP may appeal against a sentence imposed upon an accused in a criminal case in a high court. Leave to appeal must be obtained and the provisions of Section 316 of the CPA are applicable.

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When may the prosecution appeal?

Appeal against a bail decision

The prosecution may not appeal against an acquittal on the facts of the case.

Exception:

Section 65A allows the Director of Public Prosecutions to appeal against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail. The right to appeal is subject to leave to appeal granted by a judge in chambers in



terms of Section 310A. The appeal may be heard by a single judge of a local division. The prosecution may, as far as lower courts' and High Courts' proceedings are concerned, appeal against questions of law decided by a court and against a sentences imposed by a court only, except for an appeal against a bail decision which right of appeal is only available to the Director of Public Prosecutions.

(ii) Appeal restricted to a question of law

The Director of Public Prosecutions or any prosecutor may appeal against a decision by a lower court in favour of the accused on a question of law. Section 310 provides that when a lower court has given a decision in favour of the accused on any question of law, the Director of Public Prosecutions or other prosecutor may require the judicial officer to state a case for the consideration of the court of appeal, setting forth the question of law and his decision thereon. The Director of Public Prosecutions or other prosecutor may then appeal against the lower court's decision. Where the prosecution appeals the decision, the accused must be notified of the appeal. The prosecution may not appeal in order to obtain a decision on a purely academic question which will not affect the outcome of the case. The purpose of the prosecution's appeal isn't only to clarify a legal question, but to ensure that justice is done.

(iii) Appeal against sentence

Section 310A provides that the Director of Public Prosecutions may appeal against a sentence imposed upon an accused in a criminal case in a lower court. The Act doesn't mention any other prosecutor and it can be inferred that the right to appeal a sentence is not available to him. He is, however, permitted to appeal a sentence when leave to appeal has been granted by a judge in chambers. A written notice of such an application together with the grounds for the application must be lodged with the Registrar of the High Court within 30 days of the passing of the sentence. Condonation may be granted on just cause if the time limits haven't been complied with. Once the appeal has been dismissed, the Director of Public Prosecutions doesn't have a further right of appeal to the Supreme Court of Appeal and the judge's decision would be final.

Fully compare the appeal procedure applicable in terms of the CJA with the appeal procedure in terms of the CPA. (10)

Difference between an appeal on facts and an appeal on a question of law

It isn't always easy to distinguish between an appeal on a question of fact and one on law.

Fact: It is the duty of the court of appeal to retry the case on the record before the court, together with any other evidential material as it may have decided to admit and then decide for itself whether there is guilt beyond a reasonable doubt.

Law: The question isn't whether the court of appeal would've made the same finding, but whether the trial court could have made such a finding. It arises only when the facts upon which the trial court based its judgment could have another legal consequence than that which the trial court had found. Thus, it is irrelevant whether the trial court's factual findings are right or wrong.

11. MERCY, INDEMNITY AND FREE PARDON

What must a person do if his appeal to the Supreme Court of Appeal on a charge of robbery has failed? Are there any remedies at his disposal?

Section 84(2)(j) of the Constitution empowers the President to pardon or reprieve offenders and remit fines, penalties or forfeitures. President has a wide discretion when exercising these powers, only limitation being that he may not act contrary to the Constitution – ***President of the RSA v Hugo***. Nothing stops Pres from acting mero motu but generally he is petitioned for mercy by the convicted person or by someone on his behalf. Convicted persons have no right to be pardoned or reprieved and also have no right to be heard in that respect, but may only hope for the indulgence of the President – ***Rapholo v State President***. The prerogative of commuting any punishment is, therefore, that of the President. In practice however, he won't exercise his prerogative of mercy without considering a report from the Minister of Justice containing the recommendations of the DPP, the presiding officer of the trial court and the State Law Advisers. This does not detract from the fact that it remains an executive act which ought not to be influenced by the judiciary. It does, however, remain subject to judicial review.

Mr B is sentenced to 35 years' imprisonment by a High Court on charges of fraud. His appeal is rejected by the Supreme Court of Appeal. Mr B applies for mercy. The application is turned down. In prison, a state witness (S) in Mr B's case, who is in prison on a conviction for another offence, says that he "got B into a nice fix by lying to the judge". S therefore admits that he lied under oath. What legal recourse does Mr B now have? (12 marks)

Then the only remedy available to the accused will be in terms of s327 of CPA which provides that if a person convicted of any offence in any court has exhausted all the recognised legal procedures regarding appeal and review or if they are no longer available to him, such person may submit a petition supported by affidavits to minister of Justice stating that further evidence has become available which materially affects his conviction or sentence. The Minister may, if he considers that such evidence, if true might reasonably affect the conviction refer the petition and affidavits to the court which convicted the accused.

Court receives the affidavits and may permit the examination of witnesses in connection with the further evidence as if it were a normal criminal trial (accused presence not essential) and assess the value of the evidence. Courts findings regarding further evidence do not form part of the proceedings. Court finally advises the **President** whether and to what extent the further evidence affects the conviction. President considers the finding or advice and may then:

- Direct that the conviction be expunged effectively giving the accused a free pardon or
- Commute the conviction to a lesser one and adjust the sentence accordingly

The provisions do not create a remedy in the true sense, but only give a measure of hope to the convicted person, which the President may or may not fulfil. The President may not act mala fide or unlawfully and apart from these requirements, nothing can force the President to extend mercy to a person.

Although an executive action the legislator may promulgate legislation to expunge certain criminal records relating to specific convictions and/or sentences. Such expungement may be effected –

1. Automatically regarding convictions for offences committed in terms of legislation prior to the current constitutional dispensation eg. Offences committed in terms of the Internal Security Act.
2. On applications by the person concerned, for infractions of legislation enacted by the former RSA or former self-governing territories and committed before the 1993 constitution took effect and creating offences based on race, or creating offences which would not have been considered offences in an open and democratic society, based on human dignity, equality and freedom under the current constitution dispensation.
3. After a fixed period of time.
4. President considers the finding or advice of the Courts regarding further evidence and may then direct that the conviction be expunged effectively giving the accused a free pardon or